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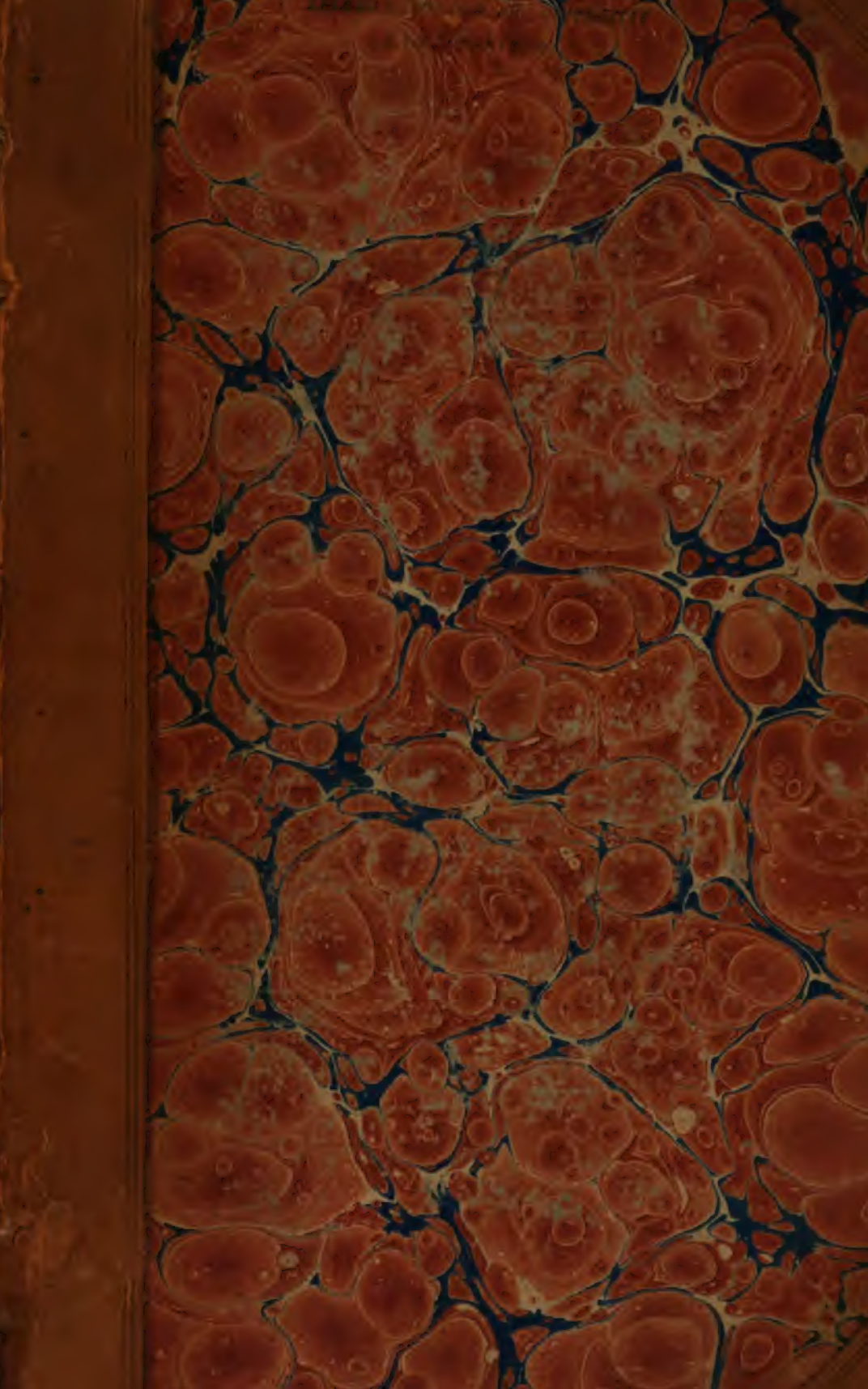
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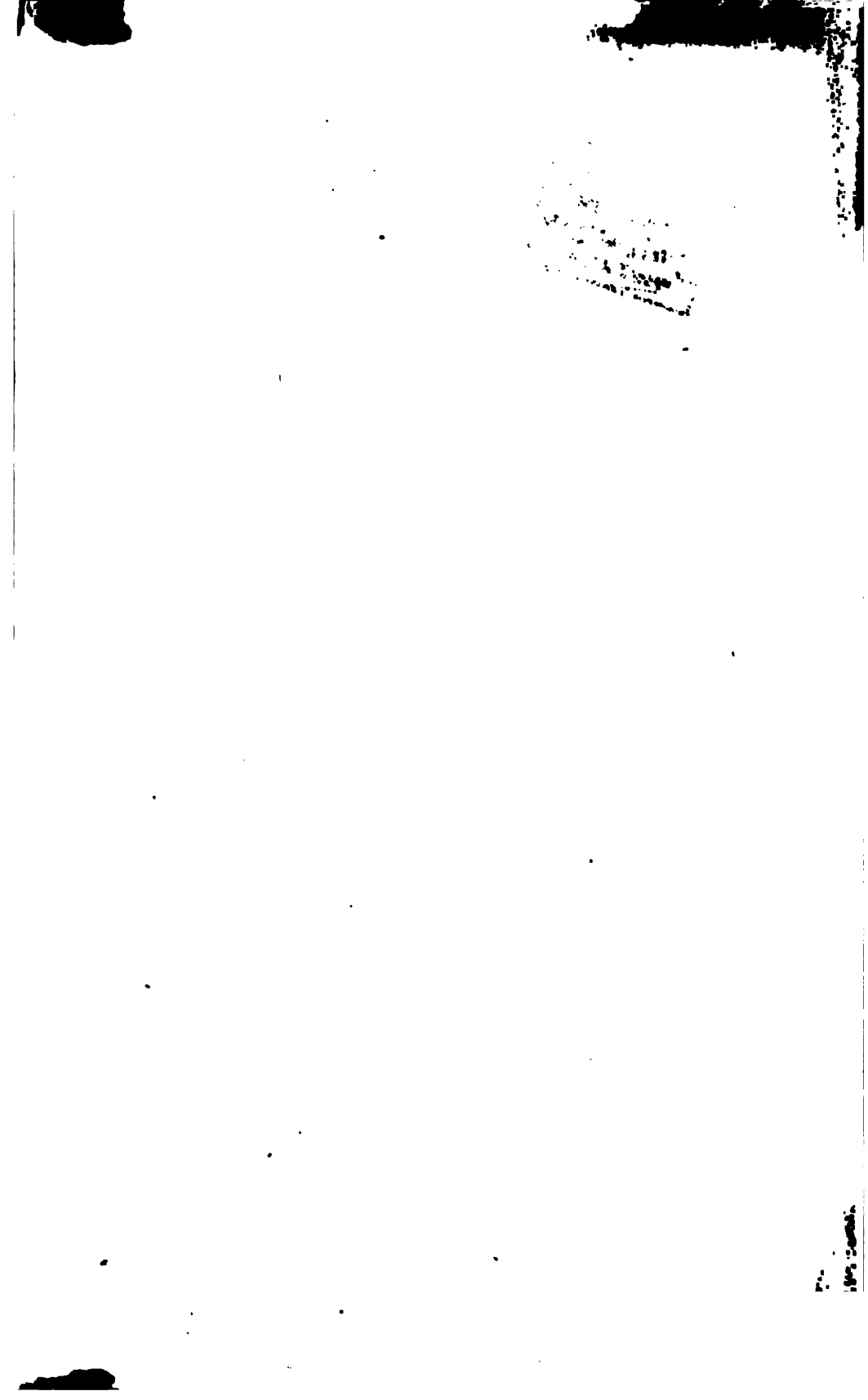
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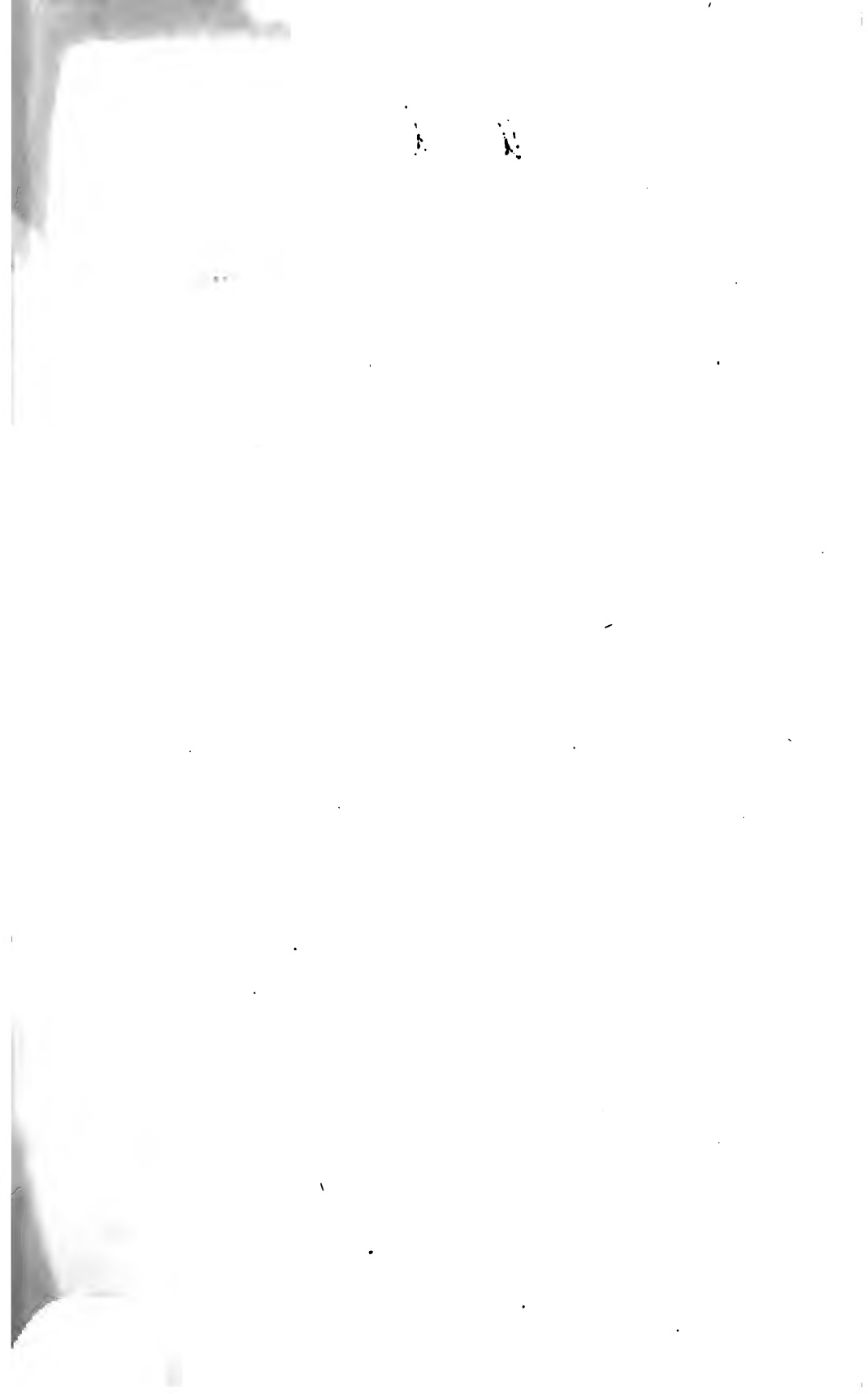
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M. O'Reilly

REPORTS OF CASES

DECIDED

IN THE

COURT OF COMMON PLEAS

OF

UPPER CANADA ;

FROM MICHAELMAS TERM, 16 VICTORIA, TO TRINITY TERM, 17 VICTORIA

BY

EDWARD C. JONES, Esquire,

BARRISTER-AT-LAW.

VOLUME III.

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JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THEIR REPORTS.

THE HON. JAMES BUCHANAN MACAULAY, *Chief Justice.*

“ “ ARCHIBALD McLEAN,

“ “ ROBERT BALDWIN SULLIVAN,

“ “ WILLIAM BUELL RICHARDS,

A

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REPORTS OF CASES
IN
THE COURT OF COMMON PLEAS.

MICHAELMAS TERM, 16 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.

“ “ MR. JUSTICE MCLEAN.

“ “ MR. JUSTICE SULLIVAN.

LAFFERTY V. STOCK.

Trespass, q. c. f.—Justification under a municipal by-law—Validity thereof—Pleading.

Trespass quare clausum fregit.

Defendant filed several pleas justifying the trespass as done by him as the servant of the Municipal Council of Wentworth and Halton, and by their command, in pursuance of a by-law by them passed (on 31st January 1850,) “in accordance with the provisions and requirements of the Municipal Council Act of 1849,” (which came into force on 1st January 1850.)

Held on demurrer, that it was a valid objection to the several pleas that they did not shew a calendar month's notice, given previous to the passing of the by-law—that, on the contrary, they imported on the face of them that it could not have been given, because the by-law was passed within a month after the Municipal Act of 1849 came into operation.

Held also, that the Municipal Act of 1849 was sufficiently referred to in the pleadings, being a public act, and that it was not necessary to set out any portion thereof either to identify it or to shew the powers of the Council under it.

Held also, that a road between the Townships of East and West Flamboro' is within the jurisdiction of the Municipal Council of Wentworth and Halton, though it may deviate in some portions entirely in one township.

Held also, that the clause of the by-law which enacted “that the petitioners should pay all expenses and costs incurred in establishing the road, and that none of the county funds should be applied for land taken for said road,” and referring plaintiff to unnamed petitioners for compensation, was void.

Quære: If such clause had the effect of rendering the by-law void in toto.

Quære also: Can any individual justify the opening of a new road through private property, under a by-law establishing the road, when the opening is not authorized or directed in the same by-law, or any supplementary one?

TRESPASS quare clausum fregit.

Writ issued 20th January—Declaration 12th May 1852.

Declaration.—For that defendant *vi et armis* broke and entered the northern part of lot No. 26, in the second concession of West Flamborough, (specially described,) and broke the gates, prostrated and destroyed the fences, tore up and subverted the soil, dug and made ditches and roads, and with horses &c., damaged the grass, cut down trees and underwood &c.

1st plea—Not guilty per stat.

2nd plea—Right of way.

3rd plea—To the whole declaration, that at the times when &c., after the passing of the Municipal Corporations Act of 1849, and after it came into operation, and before the passing of the Municipal Corporations Act of 1850, to wit, on the 31st January 1850, the Municipal Council of Wentworth and Halton, under and by virtue of the said first mentioned act, did, at the City of Hamilton, and within their jurisdiction, by a by law then duly made and published in writing under the seal of the said Council, and in accordance with the provisions and requirements of the said act, enact that a line of road in the township of West Flamborough, and afterwards described, should be opened and established in and over the said close in which &c., according to the survey and report of Thomas Allan Blythe, who was and is a provincial surveyor, duly appointed, and the same was thereby established as a public highway; which said line of road is therein described as follows: that is to say, of the width of fifty feet, commencing where the westerly margin of the original road allowance between East and West Flamborough intersects the present travelled road down the mountain leading to the City of Hamilton, between lots numbers twenty-six and twenty-seven in the concession aforesaid; thence south forty-one degrees west five chains eighty-eight links; then south twenty-seven degrees thirty minutes west three chains thirty-three links; then south twenty degrees west seventy-three links; then south forty-three degrees forty minutes west one chain and thirty-one links; then north eighty-five degrees, east one chain seventy-nine links; then north seventy-two degrees ten minutes west three chains one

link ; then north eighty-eight degrees, east three chains seventy-five links ; then south fifty-three degrees east two chains, more or less, to the westerly margin of the present travelled road between lots number twenty-six and twenty-seven aforesaid ; the road to be fifty feet wide, twenty-five feet on each side of the line above described—of which said by-law the plaintiff had notice ; and that, after making of the said by-law, and while it remained in full force &c., the defendant, by and under the authority thereof, and of the said Municipal Council, and as *their servant, and by their command*, and in the execution of the said by-law, at the said times, when &c., after due notice to the plaintiff in that behalf, did proceed to open the said road through the said close in which &c., and in so doing did necessarily break and enter the said close in which &c., and did then dig up the said soil for the purpose of opening and breaking the said road ; and because the said gates and fences, trees and underwood, &c., before the said several times, when &c., had been wrongfully placed, and were standing and growing in and upon the said highway, and obstructing the same &c., defendant justified cutting down the same &c., and removing the same to a convenient distance for plaintiff &c., doing no unnecessary damage to plaintiff, which are the trespasses in the declaration mentioned, and whereof plaintiff hath complained ; and that the said highway so ordered to be opened and established by the said by-law, and which defendant opened as aforesaid, did not run through or encroach upon any dwelling-house, barn, stable, out-house, orchard, yard or pleasure-ground. Verification.

4th plea—Similar to the last to the statement of the by-law, which is then set out at full length, as follows :—

“ No. 7.

“ A BY-LAW

“ *To alter the Road down the Mountain on the Township Line between East and West Flamborough.*

“ WHEREAS it is expedient to alter the Line of Road down the Mountain at the north-easterly angle of Lot number Twenty six, in the Second Concession of the Township of East Flamborough : *Be it therefore enacted* by the Municipal Council of the United Counties

of Wentworth and Halton in council assembled, by virtue of, and under the authority of the act of the Parliament of the province of Canada constituting and establishing the same.

"2. *And be it further enacted by the authority aforesaid*, That the following line of road be hereby established, according to the survey and report of Thomas Allan Blythe, Esquire, Deputy Provincial Surveyor, and the same is hereby established as a public highway to all intents and purposes—that is to say," (then the abutments follow, as already set forth in the 3rd plea).

"3. *And be it further enacted*, That the petitioners provide Mr. Lafferty with free access to a spring at the head of a ravine opposite to the present private road to the said spring, such access to be by a cut or opening under the bridge, to be made across the said ravine west of the spring.

"4. *And be it further enacted*, That the petitioners shall pay all expenses or costs incurred in establishing the said road.

"5. *And be it further enacted*, That none of the county funds be applied to pay for land taken for said road.

"Passed 31st January 1850."

Of which by-law plaintiff had notice. Defendant then averred that the said line of road was in and upon the said close in which, &c.; and that while it remained in full force, not quashed or vacated, &c., defendant, by and under authority thereof, and of the said Municipal Council, and by their command, for the purpose of opening and making the said road, at the said times when, &c., broke and entered the said close in which, &c., and did then dig, turn up and subvert the earth and soil, for the purpose of opening and making the said road. And because, &c., as in the last plea, defendant justifies breaking gates, cutting down the trees, &c., doing no unnecessary damage to plaintiff, and providing the plaintiff with free access to the spring in said by-law mentioned, in the manner therein described, which are the same trespasses, &c., concluding as in the last plea.

5th plea—As to the trespasses in the introductory part of the second plea (a right of way over the *locus in quo*) mentioned, that after the passing of the Municipal Act of 1849, &c., to wit, on the 31st January 1850, the municipal council aforesaid, as in the third plea, enacted the by-law set forth in the last plea—of which plaintiff had notice: and that the several trespasses in the introductory part of this plea mentioned were committed by defendant in opening

and making said road in pursuance of and under the authority of such by-law, which was and is in full force, concluding like the third plea.

6th plea—As to trespasses in second plea mentioned, that after the municipal act came into operation, the by-law in the fourth plea mentioned was passed by the aforesaid municipal council—of which plaintiff had notice; and that the said trespasses were done and committed by defendant afterwards, in pursuance and under the authority of the said by-law, and of the said Municipal Council, and as their servant, by their command, and within their jurisdiction, &c.; and that no notice of this action was delivered to defendant, or left at his place of abode, one calendar month before the same was commenced, pursuant to the statute in that behalf—concluding as in the third plea.

Demurrer to the third plea, on the grounds following:—

1st. That the plea attempts to justify under a by-law of the municipal council, passed under the powers conferred by the municipal act of 1849, without shewing—1st, what those powers are. 2ndly, Or what act in particular is referred to. 3rdly, Or the title or date of passing said act, or of its coming into force, or of the powers and authorities relied on; nor is the nature thereof sufficiently set out. 4thly, Nor is it averred that the said by-law was made in accordance with the provisions and powers of the said act.

2nd. 1st, That by 12 Vic., ch. 81, sec. 192, municipal councils cannot make by-laws for altering roads, &c., until they have caused one calendar month's notice to be given at six most public places in the neighbourhood of such road, and no such notice is averred. 2ndly, That such notice could not possibly have been given, because the by-law was passed within a month after the act came into operation, which was the 1st January, and the by-law was passed the 31st January 1850, in the same month. 3rdly, That notice of such by-law is not duly averred, not shewing from whom, or in what manner. 4thly, That it is not shewn that the defendant, at the time when, &c., was an officer of the Municipal Council, or a surveyor of highways, or that he, under their written order or command, opened the said road

under said by-law, attempting to justify under it, though not named therein; and no command unless in writing could be valid. 5thly, That it is not alleged that Blythe was a surveyor of highways appointed by the township council, nor that he ever made a survey of said road, nor when; and the allegation that the road was *thereby* established is only matter of legal inference. 6thly, That the Municipal Council has no authority to make such a by-law, appertaining to the Township Council of Flamborough West; nor is it stated that defendant, at the time when, &c., notified plaintiff that he was acting under such by-law.

Demurrer to 4th plea:

1st. Same as last.

2nd. Same as last.

3rd. That the by-law is to *establish*, not *open*, a road; and yet defendant justifies under it the opening, &c.

Read, in support of the demurrer, said he did not rely upon the grounds of demurrer containing merely formal exceptions which were amendable, but upon the substantial exceptions:

1st. He contended that the by-law did not cover the *locus in quo*, as was apparent upon comparison with the description given in the declaration; and that if it did,

2ndly. The Municipal Council of the united counties could not alter a road in West Flamborough, which the by-law attempted to do: that it belonged to the Township Council to make any such alteration.

3rdly. That the by-law being set out *verbatim* in the fourth plea, its terms and the date of passing were before the court, and was void on the face of it. That the statute 12 Vic., ch. 81, sec. 192, required a month's previous notice, which could not have been given, as that act only came into operation on the 1st of January 1850, after which the members composing the council were elected and the corporation organized, and yet the by-law was passed on the 31st January in the same year. That the plea should aver due notice, which it did not, and that, even if unnecessary to be averred, the fact that it could not have been duly

given being apparent on the pleadings, the by-law is invalid by the defendant's own shewing.

4thly. That it should have recited the powers of the council, the expediency of the by-law, that due notice had been given, that it was a measure of public utility, and to be carried out at the public expense (12th Vic. ch. 81, sec. 41, No. 11,) instead of which it omits such recital, and it exempts the county funds, and requires unnamed petitioners to allow the plaintiff access to a spring, thereby encroaching upon his lands without compensation, and referring him to unknown and intangible persons for that which the council should have ensured on behalf of the county—(12th Vic. ch. 81, sec. 195): that the powers of the body were exceeded, and the by-law void for excess of authority and want of certainty—*Kirk v. Nowill*, 1 T. R. 124: that limited powers cannot be exceeded—*Thebault qui tam v. Gibson*, 12 M. & W. 89: that notice should be alleged.

5thly. That if valid in itself it did not authorize or justify the trespass complained of: that Blythe is not alleged to have been a road surveyor or officer of the corporation—nor is it alleged that he made the survey adopted in the by-law by order of, or under the council—wherefore it had no right to act upon or confirm it: and moreover, that however valid to alter the road, or make it a road, it does not direct or authorize it to be opened: that a substantive clause or supplementary by-law was essential for that purpose, and the defendant's entry therefore illegal: that the notice stated in the declaration was insufficient: that it should be special and be alleged by whom, and upon whom it was served, and that it was in writing: that it would not become an established highway until traced and laid out by a surveyor of the corporation, or some other officer *Steiner v. Heald et al.*, 20 L. J. N. S. Ex. 401; 6 Am. Eng. 528: that it would be duly authorized.—*Dennis v. Hughes et al.*, 8 U. C. R. 446; he also cited statute 12 Vic. ch. 81, sec. 31, No. 5 and No. 16; sec. 41, No. 6, and sec. 137; In re *Lafferty and Municipal Council of Wentworth and Halton*, 8 U. C. R. 232; *Blakemore v. The Glamorganshire Canal Navigation Company*, 1 Myl. & Keene 162; *Ramsden v. The Manchester Railway Company*, 1 Ex. R.

723 : that notice of action was not necessary, 12 Vic. ch. 81, sec. 156 : that the third plea was less exceptionable than the fourth, but both were bad.

Vankoughnet, Q. C., for defendant, contended as to the third plea that the case of *Dennis v. Hughes et al.* shewed that it was unnecessary to aver notice, and that no notice was necessary in such a by-law as this, for opening a road : that it is not necessary to allege that the by-law authority to open the road was under seal : that the date is laid under a *videlicet*, and so the time of passing may have been after the expiration of a month, &c. : that if conditional, notice is to be presumed and not be averred, and is matter of defence.—*Thebault qui tam v. Gibson*. As to a negative provision in statutes, when not in the enacting part or clause, is to be pleaded as matter of defence—that it could not be alleged, but is to be negatived—*Doe ex dem. Stevens v. Clement*, 9 U. C. R. 650 : that as to the provision respecting access to a spring, the by-law may be bad as to that part, but not therefore bad in toto ; so as to the exemption of county funds : that the county is liable by statute to make compensation, and that a mandamus would lie to compel the council to negotiate or arbitrate upon the claim—in short, that the by-law was perfectly legal and good to establish a public right of way or highway over the *locus in quo*, and that as a consequence any one might open or use it, and that the defendant was therefore justified.

Read, in reply, submitted, that the very attempt to exonerate the county funds shewed that it was not deemed a measure of public utility, but merely adopted to gratify private individuals referred to as petitioners : that, if essential to confer authority, it should be averred in pleading that it was under seal, and is not to be intended : that if bad in part, the by-law is void in toto, the bad part having influenced the whole, and operated as a partial inducement or condition, on consideration upon which the residue was founded, and which therefore, had it stood alone, would have been perfectly good ; yet, by reason of its connexion with, and dependency upon the invalid parts, which affect

or pervade the whole, it is vitiated. The following provincial statutes were considered, or noticed by the court in connexion with this case :—50 Geo. III. ch. 1, sec. 3, repealed by 12 Vic. ch. 80 ; 4 & 5 Vic. ch. 10, sec. 51, repealed by 12 Vic. ch. 80, sch. A, No. 45 ; 12 Vic. ch. 81, secs. 190, 37, 38, 39, 41, Nos. 14, 187, 188, 192, 195 ; 9 Vic. ch. 8.

MACAULAY, C. J.—If the by-law does not embrace the *locus in quo*, I suppose the plaintiff's proper course would have been to have new assigned. However that might be, no authority was cited to shew that the court can determine the fact upon this demurrer. The description in the by-law is apparently intricate, but I cannot say that its inapplicability to the *locus in quo* is so palpable that it can be held upon inspection not to cover it. Assuming then, that the road in question does as the plea alleges, pass in, over, and upon said close in which &c., I think—

1st. That the statute is sufficiently referred to, and that it was not necessary to set out any portion thereof, either to identify it or to shew the powers of the Municipal Council under it. Being a public act, the court is bound to take judicial notice of it, and doing so, we know that it is the statute 12 Vic. ch. 81.—Stephens' Pleading, 5th Ed. 384, 385 ; Boyce v. Whitaker, Doug. 97 ; Partridge v. Strange, Plow. 84 ; Wells v. Iggalden, 3 B. & C. 186 ; Peate v. Dicken, 5 Tyr. 116 ; Chitty's Pleadings, 2nd Ed. 218 ; 1 Saund. 309 (5).

2ndly. A road between the townships of East and West Flamborough is, I think, within the jurisdiction of the Municipal Council, though it may deviate so as to be in some portions entirely in one township.—Statute 12 Vic. ch. 81, sec. 38.

3rdly. I think it a valid objection to the pleas, that they do not shew that a calendar month's notice was given previous to the passing of the by-law ; but, on the contrary, that they import on the face of them that such notice could not have been given. In the fourth plea the by-law is set out, and the day on which it was passed is stated. In the third, fifth and sixth pleas the time is under a *videlicet* ; but in

all the pleas the day alleged is the 31st January 1850. If material, there are the following authorities :—*Wildbore v. Cogan*, Yel. 94 ; *Skinner v. Andrews*, 1 Saund. 169, and note (2) ; *Dakin's case*, 2 Saund. 290, and notes, 1, 2, &c. ; *Bissex v. Bissex*, 3 Burr. 1729 ; *The King v. Stevens & Agnew*, 5 East. 254 ; *Stead v. Poyer et al.*, 1 C. B. 782 ; *Sheperd v. Sheperd*, id. 849 ; *Stephens' Pleading* 328-9, and note (i.) 5th Ed. ; *Nightingale v. Wilcoxon*, 10 B. & C. 215 ; *Parkman v. Whitehead*, 2 M. & G. 329 ; *Owen v. Waters*, 2 M. & W. 91. I think they shew that the words "*then duly made*" in the third plea, refer to the day laid—namely, the 31st January 1850 ; and though such day is laid under a *videlicet*, that it is to be taken as a positive allegation of the time when the by-law was passed.

The fifth and sixth pleas refer to the by-law set out in the fourth plea, and adopt the date. It is not alleged in the third plea that the by-law was made after the expiration of a calendar month from the time the act 12 Vic. ch. 81 came into force, if that would do ; nor is it averred that a month's previous notice was given, or that the plaintiff appeared and was heard. It not only appears that the prescribed notices could not have been given between the time when the act came into operation and the passing of the by-law, but in my opinion it is necessary to the validity of the plea, that it should shew that notices were duly put up according to the 192nd sec. of the 12th Vic. ch. 81, or that the plaintiff through whose land the road runs, appeared and was heard, if that would estop him from objecting the want of, or omission to publish such notices. I do not consider that part of the statute a proviso or exception ; it is a prohibition, enacting that it shall not be lawful for any municipal corporation to make any by-law for the altering or diverting any public road (which applies to the present) until they shall have caused at least one calendar month's notice to be given, as in the 192nd sec. is prescribed ; it is in effect conditional, and operates as a restriction or qualification of the 41st sec. No. 11.

The point was much discussed, but not decided, in the Court of Queen's Bench, upon an unsuccessful application

to quash this by-law.—*In re* Lafferty v. Municipal Council of Wentworth & Halton, 8 U. C. R. 232. There the plaintiff was attacking and seeking to set aside the by-law—good upon the face of it—upon the collateral ground that the notices required by the statute had not been given.—He alleged, and took upon himself the *onus* of establishing the negative; and as it was shewn that the plaintiff appeared, and was heard against the by-law, the court refused to quash it, because it was not shewn that *all* the six notices required by the statute had been duly put up. There was evidence that three had been published, and the court would not infer that three had been omitted. The objection then in effect, resolved itself into the question, whether it was necessary that the by-law should on the face of it state that the notices had been given, or whether it formed only a ground of collateral exception. The former was not deemed necessary; and, as to the latter, the fact was not proved.

It may be said that if the by-law is valid in itself without averring notice, it proves that notices must be presumed, and that the omission can only form matter of reply in impeachment of a by-law otherwise good. But, however sufficient that argument may be, when the by-law is attacked, and sought to be set aside for want of the preliminary steps to confer jurisdiction, it is another thing when such by-law is set up by plea as a defence or justification in trespass to the plaintiff's close. The defendant sets it up as a lawful by-law—the statute says it shall not be lawful to make such a by-law unless the previous notices are given—although therefore the court will not (when the by-law is assailed, and sought to be quashed,) presume they were not given; yet, when it is advanced as a valid by-law, the existence of the facts without which it could not be lawful, should be averred.

The point was also discussed, but not decided, in *Dennis v. Hughes et al.* One objection there was, that the plea did not allege that the road was laid out so as not to run through, or encroach upon any dwelling-house, orchard, garden, &c., according to the proviso at the end of the 11th

sub-sec. of sec. 41, 12 Vic. ch. 81; at page 450, the Chief Justice is reported to have said—"The by-law, I am satisfied, need not state on the face of it that the road authorized does not run through, or encroach upon any house, garden, &c., and that was not the exception taken; but that the *plea* should have averred whatever was necessary to make the by-law valid." Again, he said—"This statute is one conferring a power restricted within certain limits; and where any one has occasion to rely upon the legal execution of that power, he must show that the act done under it was within it." He cited and remarked upon the cases reported in 1 Saund. 262 (a); 1 Ld. Rayd. 120; Plow. 376, 410; 7 T. R. 27; 3 B. & C. 189; 12 M. & W. 89, to which may be added *Spieres v. Parker*, 1 T. R. 144; *Rex. v. The Mayor and Corporation of Liverpool*, 3 East. 86-7; Plow. 410, per Harper, Justice—If in the act there is a proviso or an exception, or other matter, which goes to every branch, then the party ought to plead such proviso, or exception, or other matter, because the same is parcel of every branch, so that the branch is not perfect law without it.—And see *The King v. Matters*, 1 B. & Ald. 362; also, *Rex. v. Sanderson*, 3 O. S. 103, 113; *The King v. Inhabitants of Haslingfield*, 2 M. & S. 558; *Williams v. East India Company*, 3 East. 192; *The King v. Justices of Essex*, 1 B. & Ald. 373; *Rex. v. Justices of Kent*, 1 B. C. 622; *Rex. v. Crewe*, 3 D. & R. 6; *The King v. Pratten*, 6 T. R. 559; *Rex. v. Jarvis*, 1 Burr. 148-153; *Rex. v. Mayor of Liverpool*, 4 Burr. 22, 44; *Rex. v. Manning*, 1 Burr. 377; *Rex. v. Croke*, 1 Cow. 26; *Rex. v. Bagshaw et al.* 7. T. R. 363; *The King v. The Inhabitants of All Saints*, 7 B. & C. 785; *Taylor v. Clemson & Vaughan*, 2 Q. B. 978. Nor do I consider the allegation in the third plea—"that the Municipal Council did, in pursuance of, and by virtue of the powers and authorities to them given by the said act," pass the by-law—sufficient, as importing that notices were given and all preliminaries observed. The 12th Vic. ch. 81, came into operation on the 1st January 1850, (sec. 1.)

The election of Township Councillors was appointed to be held on the first Monday of that year, (sec. 21,) who were

to meet on the second Monday and elect a Reeve, (sec. 24) ; the Municipal Council of counties to be composed of such Town Reeves, &c., (sec. 33), and meet on the fourth Monday in January, (sec. 34) ; consequently the Municipal Council which passed the by-law in question could not have been organized before the fourth Monday of the month of January 1850, which was the 28th, and the by-law was passed on the 31st. No inference as to the notice can be drawn from the previous act, 4 & 5 Vic. ch. 10, sec. 51 ; for that act did not require such notices, and was repealed by the 12th Vic. ch. 80, sch. A, No. 45.

Although by the 12th Vic. ch. 81, sec. 167, and sec. 206, the municipal corporations existing immediately previous to the 1st January 1850, were continued until the fourth Monday in the same month, with power to exercise and perform all and singular the municipal and other powers, functions and duties, which was immediately before the 1st January 1850 vested in them, as if that act had not been passed ; still no law existed previously to the 1st January 1850, requiring notice ; and the power to alter or divert a road without previous notice, at all events, expired on the fourth Monday in January 1850, which was previous to the date of the present by-law. Nor is there any room to presume the notices before the 1st January 1850, upon the ground of its being necessary ; and if in fact such notices were given, it is not alleged that they were. Were a right of way in general terms pleaded and traversed, the *onus probandi* would be upon the defendant ; and the mere production of the by-law at the trial, without any proof of the notices required by law to render it lawful, would not, in my opinion, be sufficient ; and if necessary to be proved in such a case, it shews that they ought to be alleged in the present pleas, which set forth specially how a public right of way became established in, over and upon the *locus in quæ*.

With respect to the survey and report of Blythe, not appearing to have been directed by the Municipal Council, the statute does not seem to require a previous survey and report by a surveyor of highways—(12 Vic. ch. 81, sec.

31, No. 5); and I am not prepared to say it was not competent to them to adopt the proceedings of Mr. Blythe. But I doubt whether any individual could justify the opening of a new road through private property the moment it was established, without its being authorized and directed in the by-law creating the road, or in a supplementary one. No such by-law for *opening* the line of road appears in this case, further than that the defendant alleges in the third, and fourth, and sixth pleas that he, by and under the authority of the by-law, and of the said Municipal Council, and as their servant, and by *their command*, and in the execution of the said by-law, at the times when, &c. A command under seal is not averred; and if upon this demurrer it is to be intended, it would, I suppose, suffice. The plea omits such allegation.—*Lamb v. Mills*, Skin. 587; *Wood v. Searl et al.*, Bridg. 139.

Another objection to this by-law is, that it attempts to exonerate the county funds, and to refer the plaintiff to some unnamed petitioners for compensation, and requires them to afford him access to a certain spring. These clauses may be said to be simply void, but still they pervade the whole subject matter; the first clause especially, may have operated as inducement to the council to make the by-law, and leave room for the inference that the road would not have been established; with the *onus* of compensation and preserving access to the spring, resting upon the county or Municipal Council, and without incurring the liability to compensate the plaintiff, the council was not empowered to establish a road through his lands.—See, on these points, the case already cited of *Dennis v. Hughes et al.*

Without going into the minor points specially assigned, I think judgment must be for the demurrer upon the substantial grounds mentioned.

McLEAN, J., and SULLIVAN, J., concurred.

Judgment for the demurrer.

**In re DE LA HAYE AND THE MUNICIPALITY OF THE
GORE OF TORONTO.**

Levying School-rates—Legality of By-law authorizing the same.

A by-law, passed by a township municipality, authorizing the levy of a certain rate to realize the sum of 100*l*. for school purposes, having been quashed, the municipality then, without a second meeting having been called, passed another by-law (set out in the report) for the same purpose, which was also moved against on several grounds. *Held*, on the several objections taken—1st. That the discretion to apportion the sum required rested as much with the council as with the school meeting or trustees. 2ndly. That the rate was not declared on the property assessed in 1851 (the preceding financial year), but only determined by reference to the assessed value of taxable property in that year. 3rdly. That the rate not being complained of as excessive, its being calculated to realize more than the precise sum of 100*l*. did not render the by-law void. 4thly. That the meeting was not indispensable. 5thly. That the duty imposed upon the clerk of the municipality was not unreasonable, or inconsistent with the statutes. 6thly. That the rate was properly assessed upon the whole rateable property of the school section. 7thly. That the proviso of the by-law sanctioning the receipts *pro tanto* from those who had paid under the invalid by-law did not render the second by-law void.

This was a rule dated the 1st September 1852, calling upon the Municipality of the Gore of Toronto to shew cause why a by-law, passed the 21st July 1852, intituled "A By law to assess School Section No. 5 of the said Gore of Toronto, for the erection and completion of a new School house" (hereinafter reported in full), should not be quashed with costs, on the grounds—

1st. That it shewed that such meeting of the freeholders or householders of such section as required the by-law had not been called or held by the trustees previously to the passing of the said by-law.

2ndly. That it shewed, on the face of it, that it is not in accordance with the only request the school trustees of such section could make; because such request was for a by-law raising a sum by two annual instalments, whereas the present one attempts to raise the whole sum in one.

3rdly. That it is illegal and void, in declaring a rate for the year 1852 upon a valuation made in 1851.

4thly. It declared a rate more than would be required to make up said sum of 100*l*.

5thly. Because no meeting of the freeholders or householders of such section was called to consider the passing thereof after the by-law therein mentioned had been quashed, and before the passing of the said by-law after such quashing.

6thly. Because it attempted to throw upon the clerk of the municipality a duty not given to him by statute.

7thly. Because it directs the rate therein declared to be raised from the owners or occupiers of taxable property, whereas the statute directs the same to be levied on the freeholders and householders of any such section.

8thly. Because it was void for attempting to make the receipts of parties who paid money under an illegal by-law tantamount to payment of money, which is contrary to law. The by-law—a copy of which is duly certified and proved—recites, that the inhabitants of union school section No. 5 in the Gore of Toronto, at a meeting held at the school-house, on Saturday the 18th January 1851, determined to build a new school-house for that section, and to raise the funds to pay for the construction thereof by assessment upon the ratable property in the section: and that Wm. Dobson, Elisha Lawrence and Wm. Heugell, trustees for the said section for the year 1851, did, in accordance with the determination aforesaid, petition the Municipality of the Gore of Toronto to raise, by assessment upon the ratable property as aforesaid, the clear sum of 100*l.*: and that the said council, in compliance with the said petition, did, on the 25th February 1851, pass a by-law authorising the raising of the said sum of 100*l.* by assessment on the ratable property in the school section aforesaid, in two equal annual instalments, and of which instalments one had been partially collected: and that the said by-law had been quashed; and some of the rate-payers in said school section had neglected or refused to pay, and had not paid their portion of the amount as authorised to be assessed as aforesaid.

And that the amount of ratable property in the said union section amounted to 30,300*l.* assessed value for the year 1851, and it would require a rate of six-sevenths of a penny in the pound upon such ratable property, as a special rate, to produce the clear sum of 100*l.* and cover the expenses of assessing and collecting the same, together with losses by default.

1st. It therefore enacted by the Municipality of the Gore

of Toronto, that the special rate of six-sevenths of a penny in the pound should be raised, collected or levied in the manner described by the statute in such case made and provided, over and above all other rates for the year 1852, upon all the ratable property in the union school section No. 5 of the Gore of Toronto, for the purpose of raising the said sum of 100*l.* together with the necessary charges for the collection thereof; and the proceeds of such special rate so to be raised should be applied solely to the payment of the expenses of erecting a new school-house in said school section No. 5.

2nd. That it should be the duty of the clerk of the municipality aforesaid, and he was thereby required, within ten days from the passing thereof, to furnish the secretary-treasurer of the trustees of the said school section with a list containing the names of the owners and occupiers of property in the said school section rated upon the assessment roll for the year 1852, together with the amount of their ratable property as expressed upon the said roll respectively: and the said secretary treasurer should forthwith proceed to extend the amount of the said special rate of six-sevenths of a penny in the pound upon each person's ratable property as stated in said list, and should carry out such amount, when ascertained, into a separate column opposite the name of each party respectively.

3rd. That upon the completion of the said list by the said secretary-treasurer &c., he was thereby authorised and empowered to ask, demand, receive, collect, or levy, in the way provided by statute, upon the *several owners or occupiers of ratable* property named in the said list, the sums opposite to their names respectively, as stated in the separate column, and being their proportion of the special rate as aforesaid: provided always, that it should and might be lawful for him, and he was thereby required to receive from all such parties as might have paid any portion of the rate imposed under the said by-law passed on the 25th February 1851 to the collector of the trustees therein named, the receipt of such collector for the sum so paid as so much of the special rate therein imposed.

4thly. That, to prevent the delay that would be otherwise necessary to procure counter affidavits, the objection to regularity of the meeting was understood to be waived.

5thly. That, as to the provision respecting rates already paid under the former by-law, it was unimportant; because, if collected and paid over by the former collector, credit might be given as of course, if desired by the parties who were entitled either to the return of this money or credit therefor, under the new by-law.

6thly. That the rate was properly declared upon all ratable property, and should not be restricted to freeholders and householders—statute 13 & 14 Vic., ch. 48, sec. 18, No. 1, and sec. 12 No. 9: that the freeholders and householders were petitioners for a rate to be levied upon all taxable property, and that the property, and not the inhabitants or individuals personally, was the test of liability to the rates.

He also referred to 13 & 14 Vic., ch. 67, sec. 10; *Joy v. McKinn & Guess*, 1 C. P. U. C. 13.

Hallinan, in reply, contended, that the former by-law erroneously mentioned "resident inhabitants," instead of "freeholders and householders," all of whom, whether resident or not, had votes; and that the present by-law refers thereto, and "inhabitant" must therefore be intended to be repeated in the same sense: that rates are to be raised by estimate for each year (statute 13 & 14 Vic., ch. 67, sec. 11), with reference to the amount of assessed property for that year, which has not been done in this case: that if the previous year's assessment may be adopted as the data for determining a rate, so may the assessment of any previous year, even twenty years ago, or twenty years hence, and thereby an amount realized by levying it upon the ratable property of the current year, far exceeding the sum required to be raised: that the trustees are appointed and meet annually, and the inchoate proceedings in one year need not be adopted or carried out in the following year—13 & 14 Vic. ch. 48, sec. 12, No. 7: that the Municipal Council in 1851 did virtually nothing, and could not in 1852 take up and act upon an application of the preceding year:

that a notice not followed up and acted upon becomes absolutely null: that the adoption of the application made in 1851 was in effect allowing the ratepayers of 1851 to apply for a rate to be levied upon the ratepayers of 1852; and that the council could not in 1852 levy a rate upon a valuation made in 1851; and 13 & 14 Vic. ch. 48, sec. 18, requires the money to be levied by a rate—not a rate declared by the trustees of their own authority, but by the township council—and see 14 & 15 Vic., ch. 109, sch. A. 24: that payments made under a quashed by-law cannot be made good by retrospection under the present, the effect of which is to declare a partial rate only, and not a general one—an objection going to the whole by-law and rendering it void: that by the statute the rate should be declared upon the property of freeholders and householders, who alone are entitled to vote at the school meeting, and whose property only is liable to be rated, not all taxable property—statute 13 & 14 Vic., ch. 48, sec. 12, No. 9: that no mandamus would issue to compel a rate without a renewed petition; and if it would, certainly not for a rate based upon the last year's assessment. Wherefore, upon the grounds of exception taken, he submitted the by-law was not warranted in law, and void.

MACAULAY, C. J.—The different statutes relating to this subject were referred to and partly recited in the judgment of the court upon the former by-law (a). Those most material to the present application are 12 Vic. ch., 81 sec. 31., enabling the municipality of each township to make by-laws (No. 3) for building common schoolhouses, &c., according to law, and (No. 31) for raising, levying, collecting and appropriating such moneys as may be required for all or any of the purposes aforesaid; and by means of a *rate* or *rates* to be assessed *equally on the whole ratable property* of such township liable to assessment according to any law which shall be in force concerning rates and assessments;—13 & 14 Vic ch. 48, sec. 12, enacting, (No. 12) that it should be the duty of the trustees of each school section to appoint the place, and call and

(a) 2 C. P. U. C.; 317.

sign notices of any special meeting of the freeholders or householders of such section, for the selection of a new school site, or *for any other school purpose*, as they might think proper, and to specify the objects of such meeting; and (No. 9) to apply to the municipality of the township (or employ their own' lawful authority, as they may judge expedient) for the raising and collecting of all sums authorised to be collected in the manner therein provided, to be collected *from the freeholders and householders of such section, by rate, according to the valuation of taxable property, as expressed in the assessors' or collectors' rolls*; and that the township clerk or other officer having possession of such roll should allow any one of the trustees, or their authorised collector, to make a copy of such roll as far as it should relate to their school section: sec. 18 enacting, that it should be the duty of the municipality of each township (No. 1) to levy such sum by *assessment upon the taxable property in any school section*, for the purchase of a school site, the erection, repairs; &c., of a school-house, &c., as should be desired by the trustees of such school section, *on behalf of a majority of the freeholders or householders* at a public meeting called for such a purpose, as provided by the 12th section of that act, or to authorise the trustees to borrow money, &c., and to levy by rate upon the taxable property in such section a sum in each year sufficient to pay the interest thereon and the principal within ten years: 12 Vic. ch. 81, sec. 120, that the *collectors'* rolls for the different townships, &c., shall contain the amount of the assessed value of the real and of the personal property of each person whose name shall appear thereon, as well as the amount to be collected from such person.—See 13 & 14 Vic. ch. 67, sec. 17. 13 & 14 Vic. ch. 67, sec. 32, that the clerk of the township is to make out the collectors' roll, as therein provided, &c.—See sec. 31. 13 & 14 Vic. ch. 67, sec. 1, declares what property shall be liable to taxation. Sec. 6, that all taxes to be levied under that act, or the 12 Vic. ch. 81, or under any other act whereby any local or direct taxes have been or shall be authorised to be levied, and, where no other

provision shall be made in this respect, shall be levied upon the whole taxable property, real and personal, of the locality to be taxed, in proportion to the assessed value thereof, and not upon one or more kinds or species of property in particular. Sec. 11, That the sums which shall be required by law, or by any by-law of any township or county, for any lawful purpose, shall and may be taxed, rated and raised upon estimate of the amount required for any such lawful purpose, for each year in which such tax is to be levied—(meaning, apparently, upon the assessed value of such property as distinguished from its yearly value)—See sec. 21. As to this section (No. 11) see 14 & 15 Vic. ch. 109, sec. 1. Sec. 10, That all taxes levied or assessed for any year shall be considered and taken to have been imposed for the then current year, commencing with the 1st January, and ending the 31st of December, unless otherwise provided for by their by-law imposing the same. 14 & 15 Vic. ch. 109, sec. 4—what shall be set forth in by-laws creating debts, &c. But it only applies to by-laws for creating a debt or contracting a loan on the credit of the township, &c. Among other things, it is to recite the amount of such debt or loan and the object; an amount to be raised yearly under this, 12 Vic. ch. 81, sec. 177; the amount of the whole ratable property of such township, according to the assessment returns for the same for the then next preceding financial year; the annual rate in the pound upon such ratable property required as a special rate for payment of the said debt or loan, &c.—Sec. 35 and Sch. A., No. 21, and 12 Vic. ch. 81, sec. 155, as to costs, when by-laws are quashed.

1st. The first objection I understand to have been given up.

2nd. The 13 & 14 Vic. ch. 48, sec. 12, (Nos. 9 & 12) and sec. 18, (No 1) do not declare that the school meeting may appoint the distribution of sums required to be raised by the Municipal Council over any number of years, in its discretion; but the last section enables the council to authorise the trustees to borrow money and to levy by rate, &c., a sum in each year sufficient to pay the interest

thereon and the principal within ten years. The discretion would therefore rest with the council quite as much as with the school meeting or trustees ; and moreover, the by-law is intended to give effect to the requisition made by the Trustees, by raising this year what had been desired to be raised in the last and present years. I do not consider the application void because the by-law of last year has failed, but that it was competent to the council to act thereon after it had been quashed ; and in doing so the council have been governed by the rule of *cy. pres.*, so far as in their power.

3rd. I do not consider it illegal or void because the rate is determined by reference to the assessed value of taxable property within the school section in the year 1851. It accords with the data specified in the stat. 14 & 15 Vic. ch. 109, sec. 4, and stat. 13 & 14 Vic. ch. 67, sec. 31, and it is but matter of recital. The rate is not directed to be levied upon the property assessed in 1851 ; but the by-law (reciting the amount of ratable property in 1851, which was the next preceding financial year, and the amount in the pound upon such ratable property necessary to raise the required sum) declared a rate accordingly to be raised upon all the ratable property in the school section, which, operating from the passing thereof, subjected the whole taxable property as assessed for the year 1852 to such rate, according to the stats. 13 & 14 Vic. ch. 48, sec. 12, (No. 9); 12 Vic. ch. 81, sec. 31, (No. 31) ; and 13 & 14 Vic. ch. 67, sec. 6, sec. 10, and sec. 11, as clearly shewn by the 2nd section of the by-law.

4th. It is not complained of that the rate is excessive as compared with the assessed value of ratable property either in the year 1851 or 1852 ; and its being calculated to realize more than the precise sum of 100*l.* does not render it void.—See 2 U. C. C. P., 89, *In re Hawkins v. Municipal Council of Huron, Perth & Bruce*. And should there be a small surplus over and above the amount required to be raised, it would go to and ought to be applied to the school purposes of the section, according to the spirit of 13 & 14 Vic. ch. 67, sec. 12.

5th. I do not consider such meeting indispensable.

6th. The clerk does not complain : his duties depend upon the statutes. The 12 Vic. ch. 81, sec. 31, (No. 6) empowers the township council to prescribe the duties of all officers acting under the authority of the corporation, and the clerk is one of such officers.—See secs. 169, 170, and see sec. 120. The 13 & 14 Vic. ch. 67, secs. 31, 32, prescribes similar duties in relation to the collectors' rolls generally. And although the 13 & 14 Vic. ch. 48, sec. 12, (No. 9) merely requires the clerk or person in possession thereof to allow the trustees to make a copy of the assessor's or collector's roll, so far as it related to the school section, it more especially applies to cases in which the trustees employ their own authority for raising and collecting sums authorised to be collected in the manner therein provided.—See 13 & 14 Vic. ch. 48, sec. 12, (Nos. 7, 8,) &c. And, notwithstanding this peremptory regulation, I do not see that it is out of the power of the council to direct the clerk to furnish the list or roll, in furtherance of their own by-law directing the levy of a school rate ; for if it was, then the council could not, according to 12 Vic. ch. 81, sec. 31, (No. 6) prescribe his duties. It appears to me such clause applies to special as well as general duties, and I perceive nothing unreasonable in what the present by-law required him to do.

7th. I think the rate is properly assessed upon the whole ratable property in the school section, according to the statute 12 Vic. ch. 81, sec. 31, (No. 31) ; 13 & 14 Vic. ch. 48, sec. 12, (No. 9) sec. 18 ; and 13 & 14 Vic. ch. 67, sec. 6.

8th. I do not think the proviso to the 3rd section of the by-law renders it void. The former by-law being quashed, the parties who had paid under it would become entitled to restitution on the one hand, but become bound to pay *de novo*, under the present by-law, on the other ; and if, instead of that course, credit was given by mutual consent for the payments made, it manifestly comes to the same thing, and the arrangement, if legal, was obviously both just and expedient. No one who had paid was bound to produce

and deliver up the receipt—it rested entirely in his discretion—and the by-law only sanctioned the acceptance of receipts from those who had paid the former collector. For all that appears, the sums collected by him may have been paid over by him and have been received by the school trustees; and if such payments are by all concerned confirmed, I do not see that any one can be thereby prejudiced, or made to pay anything more, or that any one would be relieved from paying anything less. The former payments were simply authorised to be adopted *pro tanto*. It does not appear that the collector absconded with the money, or refused to account for and pay it over, or that he had restored it to the parties who paid the same; and in the absence of anything to shew that any loss, delay, or prejudice would be thereby occasioned, I should be sorry to think an arrangement, in my opinion so obviously just and expedient, should not only be frustrated in itself, but should invalidate the by-law. It does not make the receipts tantamount to payment of money; it only provides that the collector should receive from all those persons who had paid any portion of the rate imposed under the former by-law to the collector of the trustees therein named the receipt of such collector for the sum so paid, as so much of the special rate imposed by the present by-law. If the receipt was false, and the person tendering it had not paid the amount imported, it could not be substituted for payment under the last mentioned by-law. I think therefore that the rule should be discharged with costs.

McLEAN, J., and SULLIVAN, J., concurred.

Rule discharged with costs.

BLACKLOCK V. MILLIKAN.

Trespass, q. c. f.—When maintainable.

TRESPASS *quare clausum fregit* will lie by the owner of a close into which a neighbour's pigs may break, and enter, and do damage, against the owner of the pigs, unless he can excuse the act for defect of fences, or upon some other ground that ought to be specially pleaded.

This was an action for trespass to the plaintiff's close by

the defendant's pigs breaking into the same, and damaging the wheat growing thereon.

Plea—Not guilty.

At the trial, the defendant's counsel contended that the action would not lie, and there was conflicting evidence as to the defendant being the owner of the pigs—the most positive being against it. The jury, however, found for the plaintiff, with five pounds damages.

Freeman, for the defendant, moved, this term, for a nonsuit on leave reserved, or for a new trial, resting principally upon the former, as the smallness of the verdict operated too strongly against the latter if there was any evidence to go to the jury to support it.

MACAULAY, C. J.—Having perused the notes of Mr. Justice Sullivan, who tried the cause, I do not think we can disturb the verdict, so small in amount, as being against evidence, although the weight of it was in favour of the defendant; (here his Lordship reviewed the evidence relative to ownership, which is not material to be reported.)

The ground of nonsuit is, that trespass *quare clausum fregit* will not lie by the owner of a close into which a neighbour's pigs may break, and enter, and do damage, however liable they might be to be distrained *damage feasant*. No authority has been cited that supports this objection; and I have always been of opinion that for trespasses by domestic animals, such as horses, cattle, pigs, &c., the owner of the close might maintain trespass against the owner of the animals, unless he can excuse the act for defect of fences, or upon some other ground that ought to be specially pleaded—notwithstanding the right of distress *damage feasant* as a more summary remedy. The animal might have left the premises before discovery, having first committed serious injuries for which it could no longer be distrained; when, if there is no remedy by trespass, I find no authority for an action on the case. The following references shew that trespass will lie.—*Mason v. Keeling* (12 Mod. 335), *Ld. Rayd.* 608, *Rex v. Huggins* (Ib. 1583), *Dy.* 25 pl. 162, *Buxendin v. Sharp and Jenkins v. Turner* (*Salk.* 662.) More especially, see *Roscoe on Real Actions*,

667; Com. Dig. "Trespass," C.; 2 Roll. Abr. 568 1, 30; Keilway, 3, case No. 7; Vin. Abr. "Trespass," B. 1 & 2. Dawtz v. Huggins (Clayt. 32,) 13 Hy. pl. 10. If so, there is no sufficient ground therefore for any rule in this case, although we should have been better satisfied with a verdict for the defendant on the fact of ownership. That the plaintiff however, had sustained serious damages, was clearly proved, whoever owned the pigs.

Rule refused.

DOE MARR V. MARR.

Bastardy—Admissibility of evidence to prove the same.

Whenever it is sought to bastardise a child, if it only appear that the child may be the offspring of her mother's husband, or of another man, not the husband, but it is doubtful of which, the law presumes in favor of legitimacy, and does not sanction a discriminating inquiry upon the subject.

The fact to be established in this case was the negative of the presumed legitimate paternity by proof of non-access. The facts adduced in evidence are fully given below; and *held*, that as to the evidence offered, that of general reputation of intercourse by the mother with some person other than her husband three months before marriage, was properly rejected. The husband committed suicide five months after the marriage; and *held*, that proof of the report in the neighbourhood as to its cause, was also properly rejected; and further *held*, that it was in the discretion of the learned judge at Nisi Prius to refrain from committing the alleged father who was examined as a witness, for contempt in not answering, because it was sought by the questions put to him to elicit an admission of facts importing a scandal upon himself. Besides, the learned judge thought the witness intoxicated, and by no means able to give evidence at all.

Evidence of the resemblance of the child to the alleged father, if relevant to the issue, is admissible. It can only become relevant after a sufficient foundation has been laid to raise suspicion. *Held*, that in this case such foundation appeared to have been laid, and the evidence was therefore admissible. But the plaintiff having voluntarily elected a nonsuit (not by the suggestion or direction of the court), without any reference to the rejection of such evidence, he cannot be relieved against it in a case like the following:

EJECTMENT for the west half of lot 10, in the 5th concession of Glanford. Demise laid on 1st of January 1850.

This case was tried before Mr. Justice Draper, at the last spring assizes holden at Hamilton, in the county of Wentworth. The lessors of the plaintiff claimed the premises by descent from Lawrence Marr, who died seized intestate, leaving David Marr, his eldest brother, and Richard Marr his father. The defendant claimed to be the only child and heiress at law of the said Lawrence Marr, and the case turned upon the question of her legitimacy.

It appeared in evidence that Lawrence Marr lived on

the land in question with the lessors of the plaintiff, in the years 1831 and 1832: that he was supposed to be paying his addresses to Elizabeth Bunker, the defendant's mother, who lived in the neighbourhood: that in the spring of 1831 he went from Glanford to Port Dover, in the county of Norfolk, and remained absent during the summer—but returned in the autumn, some witnesses thought between the 20th and 30th of September, others about the 1st of October: that he married the defendant's mother on the 1st of November 1831, committed suicide in March 1832, and that the defendant was born on the 10th of June 1832.

It was proposed by the plaintiff's counsel to prove a general reputation of the neighbourhood that the defendant's mother for three months before her said marriage had criminal intercourse with some person other than her said husband—and the report of the neighbourhood as to the cause of his having committed suicide—both of which the learned judge refused to admit.

It was then proved by a woman present at the birth, that the defendant appeared to be a full grown child when born: that she thought all was right, and could not pretend to say if a seven or a nine months' child.

It was further proved that one James Smoke was in that part of the country in 1831, and was seen in company with the defendant's mother one evening after harvest—and before Lawrence Marr's return or marriage—about the middle of September, at an assemblage of young persons called a paring bee, at her residence, during the absence of her parents, who were from home, and she being the eldest member of the family at home, the next in age being a sister twelve or fourteen years old: that the company left the house between twelve and one o'clock at night, but Smoke remained behind. It was supposed Smoke had come sparking or courting Elizabeth Bunker.

At this stage of the case it was proposed to ask a witness questions, with a view to shew that the defendant resembled Smoke very strongly, and Lawrence Marr not at all, which the learned judge declined, not thinking a sufficient foundation laid for the introduction of such evidence to bastardize the defendant, which was the object.

It was then proved that the defendant's mother had been seen alone with Smoke in the road, a short time before Lawrence Marr returned from Port Dover; also, that the defendant's mother and Smoke were seen walking together in the road going towards her home on the 1st of September, and that they had been seen frequently together, but nothing wrong was observed; also, that two persons met her and spoke to her, and asked her how she was, to which she replied that she was not very well, but sick and weak: that Lawrence Marr returned a few days after, at which time she lived at her uncle's—four miles from Marr's—and that Lawrence Marr was seen at his father's nearly every day. It was also in evidence, that when Lawrence Marr had destroyed himself by hanging, she did not seem much affected, and behaved in a light manner in her talking.

James Smoke was then called, and said he knew the defendant's mother before her marriage with Lawrence Marr; he denied having had any criminal intercourse with her on the night of the bee. The learned judge then noted that he appeared intoxicated, and evaded answering as to criminal intercourse with her at other times—and being urged by the plaintiff's counsel to compel an answer, the learned judge did not think the question one which he would commit a man for not answering, and allowed the witness to retire. The case was then closed. And on the learned judge intimating that on the evidence he would charge the jury strongly against the plaintiff, his counsel took a nonsuit, saying he preferred that course. No leave to move to set aside such nonsuit was noted—but it seemed to have been understood that it was not accepted in acquiescence in what the learned judge had ruled, and said he was prepared to do in charging the jury, but with the intention of moving in term.

In Easter Term last, *Martin*, for plaintiff, obtained a rule upon the defendant, to shew cause why the nonsuit should not be set aside, and a new trial be had without costs, for the rejection of evidence, for misdirection, and the verdict being contrary to law and evidence.

Cause was shewn in the early part of the following

term, by *Freeman*, for defendant. He contended the evidence rejected was properly excluded, and that there was not sufficient evidence to go to the jury to warrant the inference of the defendant's illegitimacy, which was the fact in question : that upon such evidence almost any first born child might be bastardized : that the marriage had preceded the birth seven months and upwards, and that there was evidence of opportunity of access for the full period of ordinary gestation : that legitimacy was to be presumed till rebutted, and that the evidence to repel it was too slight to rebut the presumption : that no sufficient ground was laid for proof of resemblance, which can only be received in corroboration, and not as the principal evidence of a child's paternity : that it was not made a ground of the motion that the learned judge should have compelled Smoke to answer : that the mother might have been called as a witness : that illicit intercourse with the defendant's mother could not be inferred from the only facts in evidence, and that even had he alleged it, it could not invalidate the defendant's legitimacy, there being proof of opportunities of access by her mother's husband. He cited the following authorities :—Co. Lit. 244 (a) ; *Regina v. Murray*, 1 Salk. 122, 5, and note ; *Rex v. Alberton*, 1 Ld. Ray. 395, Carth. 469 ; Holt 507 ; *Pendrell v. Pendrell*, 2 Stra. 925 ; *Rex v. Inhabitants of Bedall*, Ib. 1076 ; *Rex v. Reading*, Hardw. 82 ; *Stapleton v. Stapleton*, Ib. 277 ; *Rex v. Rook*, 1 Wil. 340, Sayer 62 ; *Goodright ex d. Thompson v. Saul*. 4 T. R. 356 ; *Rex v. Luffe*, 8 East. 193 ; *Rex v. Inhabitants of Kea*, 11 Ib. 133 ; *Cope v. Cope*, 1 Mood. & Rob. 275, 5 C. & P. 604, S. C. ; *Morris v. Davies et al.*, 3 C. & P. 215.

Martin, in reply, contended that the question was, whether the defendant was Lawrence Marr's child or not—not whether she was Smoke's, or whether he had seduced her mother, and was the father—whether, in short, she was bastard or legitimate : that most of the cases of this kind were of children born not only during wedlock, but so long after marriage as to afford ample time for gestation, whereas,

here it was clearly an ante-nuptial conception, although the defendant being born in wedlock is by law *prima facie* legitimate.—He cited Foxcroft's case; 44 Ed. III. c. 12, sec. 21; 45 Ed. III. c. 28, sec. 45; Lapsley v. Grierson, 1 House of Lords' cases, 498—No presumption against an act because it would be an offence against law—must depend upon the circumstances.—Per Lord Campbell, *Ib.* 505; Doe dem. Burtwhistle v. Vardrill, 6 Bing. N. S. 385; and submitted that however, a child born in wedlock was *prima facie* legitimate upon the presumption that the mother's husband was the father, and that however the same rule would apply to ante-nuptial conceptions where the woman's pregnancy was known to the husband at the time of marriage, that the presumption was weakened most materially where the conception was not only ante-nuptial, but at a period so near the time of marriage that the woman's pregnancy was not visible, and could not have been notorious to observation, and therefore may have been entirely unknown to the husband, and that the presumption so enfeebled could be repelled by less weighty proof of illicit intercourse with another not her husband—in other words, that the child was not the husband's—than in the other cases.

Further, that the proof of Lawrence Marr's absence, and of Smoke's intimacy—compared with the time of Lawrence Marr's return—of the marriage and the birth—repelled all presumption that the child was Lawrence Marr's—in other words, was legitimate; and the fact would have been placed beyond all reasonable doubt, had the defendant's resemblance to Smoke been proved: that the learned judge should have admitted proof thereof, and have left the case openly to the jury, without charging strongly against the plaintiffs, as he said he would do.—1 Inst. 8, a (71); *Ib.* 123, 4 (1); Bac. Ab. "Bastardy," 18; Inter. The Parishes of St. George & St. Margaret, Westminster, 1 Sal. 123; Cope v. Cope, 5 C. & P. 604, 1 Moo. & Rob. 269-275; Banbury Peerage, 1 S. & S. 153; Hargrave v. Hargrave, 9 Beavan, 552; Morris v. Davies, 5 C. & F. 163; The Barony of Say v. Sele, 1 House of Lords, 511; Caton v. Caton, 13 Jur. 431-434; Levedon v. Levedon, 2 Hag.

Consist. Rep. 2, 4; Wood v. Wood, 4 Hag. Eccl. Rep. 283; Hamerton v. Hamerton, 3 Hag. Eccl. Rep. 2: that had the marriage existed all the time, the evidence was sufficient to go to the jury to prove illegitimacy, and *a fortiori* as the fact was: that Smoke's intimacy with defendant's mother was not only admissible but cogent proof of illicit intercourse.—Goodright & Stevens v. Moss, 2 Cowp. 595; Rex v. The Inhabitants of Sourton, 5. A. & E. 180; Patchell v. Holgate, 15 Jur. 309, 3 Am. Eng. Rep. 100: that the defendant was not called by Lawrence Marr's name, but by that of the second husband of her mother, who had married again; that evidence of likeness or resemblance was admissible—Morris v. Davies et al., 3 C. & P. 215: that before marriage there could be no presumption of access, *i. e.*, sexual access by Lawrence Marr, either before or after his return from Port Dover, the inference of legitimacy in case of ante-nuptial conception not resting upon such presumption, but by a mere rule of policy, arbitrarily adopted.—Randall v. Randall, 3 Curtis 119: that the evidence of the midwife was given to prove the fact and time of birth—but that her inference as to the length of gestation—whether seven months or nine months, was not admissible.—*In re* Martin's divorce bill, 1 House of Lords' Cases, 79; Beck's Medical Jurisprudence: that the only just inference was, a full nine months' child at birth; and that therefore the mother's conception must not only have preceded marriage, but preceded the return of Lawrence Marr from Port Dover—wherefore, on the strictest grounds, sufficient evidence of non-access by him was given.

MACAULAY, C. J.—Upon the learned judge intimating at the close of the plaintiff's case, that on the evidence he would charge the jury strongly against him, his counsel, without renewing the offer of proof of resemblance, or tendering any further evidence, or waiting to hear the defence or the charge, voluntarily elected to be non-suited—thereby withdrawing the case from the jury, and putting an end to it by his own act. A non-suit so accepted cannot, on this rule, be set aside, unless we see that the learned judge erred in law, either in the rejection of evidence, or

in the direction or charge he was prepared to deliver to the jury—for, as he had given no direction or charge, there was no actual misdirection; and the non-suit being the plaintiff's own act, and not directed by the learned judge, I do not see that it can now be permitted to the plaintiff's counsel to contend that it was against law and evidence, unless the argument prevails that the presumption of legitimacy had been sufficiently repelled to entitle him to recover, and therefore to a direction in his favour—and such, I infer from the argument in support of the present rule, was the principal ground on which he relied for setting aside the non-suit.

The cases of *Butler v. Dorant* (3 Taunt. 229), *Elworthy et al. v. Bird* (13 Price 222), *Ward v. Mason*, (9 Price 291), *Alexander v. Barker* (2 Tyr. 140, 2 C. & J. 133), *The Attorney General v. Good* (McClel. & Young 286), *Vacher et al. v. Cox* (1 B. & Adol. 145), *Simpson v. Clayton* (2 Bing. N. S. 467, 2 Scott 691), *Barnes et al. v. Whiteman* (9 Dow. 181), shew that when a plaintiff elects to be non-suited, it will not be set aside, unless the court see that the learned judge was wrong in the reception or rejection of the evidence, or in the direction he had given, or was about to give.

1st. Then as to the intended charge of the learned judge.

The object of the plaintiff's evidence was to establish the defendant's illegitimacy.

In cases of clearly post-nuptial conception and birth during wedlock, or within a period so recent after its termination as to leave no doubt of conception during wedlock, the following authorities shew that legitimacy is presumed, unless it be established by evidence, strong, distinct, satisfactory, and conclusive, that the husband had not sexual access to the wife and mother at any time, when by such access he could by the laws of nature be the father of the child—*The Banbury Peerage case*—Opinion of the judges delivered to the House of Lords; *Head v. Head*, (1 S. & S. 153), *Morris v. Davies* (3 C. & P. 215, 427), same case in appeal (5 C. & F. 236), *Cope v. Cope* (5 C & P. 604, 1 Moo. & Rob. 269), *Regina v. The Inhabitants of Mansfield* (1 Q. B. 444), *Pendrell v. Pendrell* (Strange

925), *The King v. The Inhabitants of Bedall* (Ib. 7076), *Goodright dem. Thompson v. Saul et al.* (4 T. R. 356), *The King v. Luffe* (3 East. 193), and others cited in the argument.

In cases clearly of ante-nuptial conception—but of birth during wedlock—the marriage of the parties is the criterion adopted by law for ascertaining the actual parentage of the child—and for that purpose it will not examine when the gestation began, looking only to the recognition of the husband in the subsequent act of marriage.—Per Lord Ellenborough in *Rex v. Luffe*; Co. Lit. 123 b, 244 a, 245 a (1); *Theaker's case* (Cro. Jac. 686), 1 Roll. Ab. 358, 359; *Hardres* 277, *Rex v. Alberton* (1 Ld. Ray. 396), *Doe Burt-whistle v. Vardill* (5 B. & C. 43, 6 Bing. N. S. 385), 2 Star. Ev. 1 Edm. 220.

Formerly in post-nuptial conceptions, the absence of the husband beyond the seas during the whole period within which the child could have been begotten—and indeed throughout the whole period of gestation—was deemed essential to the proof of illegitimacy. But that doctrine has been long exploded, and non-access may be now established notwithstanding the place of residence of the husband may have admitted opportunities of sexual access to the wife.

It seems also to have been supposed that in cases of ante-nuptial generation, the question of legitimacy was concluded by the marriage before birth, and that the legitimacy of the after-born child could not be disputed at all, upon the ground that the law made it legitimate *juris et de jure* like the offspring preceding marriage under the canon and civil law (3 East. 208, 6 Bing. N. S. 385 *supra*.) as in Scotland. But I think it is now understood that the paternity may be controverted in the same manner as in cases post-nuptial.

It is remarkable in the present case, that although it may have been an ante-nuptial conception, yet the pregnancy had not so far advanced as to be obvious at the time of the marriage, and that the birth was posthumous; there is therefore no room to apply the conclusive doctrine of voluntary adoption according to what is said in 1 Roll. Ab.

358, by reason of the notorious or known condition of the woman at the time of marriage, nor was there any opportunity of recognition after birth, by reason of the premature death of the husband.

Many of the cases present instances of post-nuptial conception, and of birth during wedlock—and in others of ante-nuptial generation, especial stress is laid upon the birth being in wedlock. So far however as birth during wedlock is material, I infer that its being posthumous makes no difference if the conception was clearly during wedlock, or if both the marriage and the termination of wedlock occurred within and during the ordinary period of gestation; wherefore I look upon it just as if Lawrence Marr had been living at the time of the defendant's birth, and consider her entitled to be regarded as born in wedlock, and to the benefit of the presumptions of law and fact in favor of her legitimacy resulting therefrom.

Without attempting to enter at large into any elaborate disquisition upon the origin of the rule, or of the principles upon which the presumptions repose, whereby a child born in lawful wedlock is deemed legitimate although undoubtedly of ante-nuptial conception, I think illegitimacy is in such event to be made out in the same way as if the conception had been post-nuptial—that is, by proof of non-sexual access by the husband of the child's mother. In *Rex v. Luffe*, it was said by LeBlanc, J., that it was a rule of law not be broken in upon except as in other cases. Cro. Jac. 541, 685, and cases ante.

If, though begotten before marriage, the birth in wedlock stamps the legitimacy *juris et de jure*, yet not incontrovertibly, it seems to me to follow that ante-nuptial access must be presumed, and the conception legitimized by retrospection; and if so, that the presumption in favour of the legitimacy must be repelled in like manner as if the child had been begotten as well as born during wedlock—that is, by proof of non-access.

In cases of ante-nuptial conception, but of birth during, or within due time after the termination of wedlock, legitimacy is presumed until the contrary be established,

upon the principle I suppose of imputed parentage arising from presumed ante-nuptial access, which, as an ecclesiastical offence, had been cured by the efficacy of the subsequent marriage (Co. Lit. 245 *a* (1), 2 Inst. 96, Statute of Merton, 20 H. III. c. 9, 5 B. & C. 440, 6 Bing. N. S. 385), and of implied adoption. And where the legitimacy is sought to be impeached, it appears to me it must be accomplished through the same medium of proof, whether the conception be ante or post-nuptial.

The question is the same in both cases—namely, whether the husband was the father of the child ; and in both cases alike the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to establish to the satisfaction of the jury, that no sexual intercourse took place between the reputed father and the mother, at any time when by such intercourse the husband could by the law of nature be the father of such child—although it may be reasonable to hold that as being a matter of fact to be negatived by evidence—the presumption of paterinity—that is, of sexual access—may be more easily repelled in the one case than in the other—on the ground that, although so far as intimacy and proximity of residence went, there was the opportunity of access, yet the probability or presumption thereof would be weaker before marriage than afterwards, when a husband would be presumed to have availed himself of the opportunity as a marital privilege, until the contrary was shewn, and which privilege before marriage the man could not legitimately claim or exercise ; and this might be said, notwithstanding its being manifest, from the result that the mother had admitted access, and was enciente by some person, and which person would *prima facie*, and until the contrary was proved, be presumed to be the husband. Such presumption would not be repelled by mere proof of access by another, without anything to shew the absence of concurrent opportunity or to disprove similar access by the husband about the period of generation—and still less, if access by him was also proved or admitted ; for I do not consider that (admitting circumstances shewing equal

possibility, or probability of its being the husband's child, but doubtful whether he or another was actually the father,) it could properly be made a direct and independent question who was the father—however cogent the evidence on that head might be as collateral or circumstantial evidence touching the fact of non-access by the husband at the time in question. It would be contrary to the well settled rule on that head in cases of post-nuptial conception. If mere proof of sexual intercourse by another, with opportunities of similar access by the subsequent husband, would be sufficient to repel *prima facie* the presumption of legitimacy, or of the latter being the father, it would follow, that (contrary to the rule in post-nuptial cases) the *onus probandi* would be thereby cast upon the offspring to prove affirmatively sexual access by the husband, and therefore the supposed father, if that would do, or if that would not go far enough, to prove that the child was in fact begotten by him; and the jury would be called upon to discriminate touching the parentage—a fact depending upon balancing evidence, and susceptible of no express, direct, or better proof than might perhaps be afforded by mere personal resemblance; whereas, I entertain the impression that when it only appears that the offspring may be the child of one or the other, but doubtful of which, the law presumes in favour of legitimacy, and does not sanction a discriminating inquiry upon the subject.

I take it therefore, that whether Lawrence Marr was to be deemed the father of the defendant, depended upon the opinion of the jury how far the presumption of sexual access, at a period when by the laws of nature the defendant could have been his child, was rebutted to their satisfaction.

Bearing in mind then, that the fact to be established was the negative of presumed paternity, by proof of non-access, the facts as they stood in evidence were represented to have been—that in 1831 Lawrence Marr and Elizabeth Bunker both resided in the township of Glanford, and that he was supposed to be paying his addresses to her as a suitor: that in the spring of that year he removed to Port Dover, many miles distant, but how far not being stated—

but so distant as to preclude the presumption of access during his absence—and that he continued absent until the autumn, (according to some witnesses between the 20th and 30th of September, and of others, about the 1st of October), when he returned : that he married her on the 1st of November following, and committed suicide in March 1832, having apparently cohabited with her from the marriage up to the time of his death ; and that the defendant was born on the 10th of June then next ensuing, apparently a full grown child ; but the woman present at her birth could not say of a nine months' or seven months' child : that a man named Smoke was acquainted with the defendant's mother, and had been frequently seen in her company during Marr's absence, but nothing improper was observed, except that on one occasion about the middle of September he was one of a party that had been invited by her to a paring (apples) bee at her father's and her own residence, but when her parents were from home ; and that when the other guests left the house, between twelve and one o'clock at night, he remained behind—she being the eldest member of the family then at home, and the next a younger sister twelve or fourteen years old ; but Smoke himself having been called as a witness for the plaintiff, denied any illicit intercourse with her on that occasion—declining however, to answer, or evading the question, whether he had had such connexion with her at any other time.

Now, from the time Lawrence Marr returned he had the opportunity of access ; and though it was not proved that he and his future wife had ever been actually seen together at any time between his return and marriage, it was reasonable to suppose that they must have had personal interviews ; and there was no evidence that Smoke had been observed in her company after Marr's return.

The earliest period at which Marr could have had access to her being a very material fact, and the legitimacy of the defendant virtually depending upon the other fact, whether conception had taken place before he could reasonably be presumed to have the opportunity of such access—a case

was presented to the court and jury, in which the precise time of his return, and whether the defendant was at birth a full grown nine months' or a seven months' child, became of peculiar importance, and yet no attempt was made to impeach her legitimacy until nearly twenty years after she was born.

Depending, as dates and the appearance of the new born child did, upon the frail memory of witnesses who had no especial reasons for noticing and recollecting them, and material as strict accuracy was upon points rendered so very material from the circumstance that it was quite possible that the conception was post-nuptial (the marriage having preceded the birth seven months and ten days) ; or if ante-nuptial, that it was after Marr's return, from which time he might have had sexual access ; it was to be expected that the learned judge would have admonished the jury not hastily to draw the conclusion of ante-nuptial conception when it might have been post-nuptial ; or if ante-nuptial, not to draw the further inference of such conception having occurred before Marr returned—in other words, not unless thoroughly satisfied thereof to find non-access by Marr, or bastardize the defendant, upon evidence of which it could not be said (according to the language of Lord Lyndhurst in *Morris v. Davies*, 5 C. & F. 265) that it was strong, distinct, satisfactory or conclusive.

What points would have been made, or in what precise terms the case would have been submitted to the jury, or how the learned judge would have directed them, or expressed his views upon the subject of access by Marr, and to what extent the presumption thereof was to be presumed until repelled, or of the necessity for establishing non-access in order to establish the defendant's illegitimacy, we are not informed. It does not appear that he was asked to pronounce any specific opinion thereupon, or to leave the question of legitimacy to the jury in any particular form as respected the fact, or conclusion of fact, that would be sufficient or necessary to establish it ; nor did he declare in what points of view he intended to present the case for their consideration, beyond the intimation that he should

charge strongly against the plaintiff's case under the evidence given.

The non-suit precluded all further explanation on this head, and there is therefore no ground for setting it aside by reason of the strength of the plaintiff's case, or of the terms, so far as we can see, in which the learned judge intended to leave it to the jury. He did not express any intention of directing a verdict for the defendant, or of withdrawing the evidence from the jury, but said he would leave it to them with strong observations unfavourable to its weight in relation to the issue, or to its adoption as satisfactorily leading to the conclusion of the defendant's illegitimacy.

1. I think the learned judge correctly rejected evidence of the alleged general reputation in the neighbourhood that the defendant's mother had illicit intercourse with Smoke for three months previous to her marriage with Lawrence Marr; although Alderson, B., in *Cope v. Cope*, (1 Moo. & Rob. 271-6; Taylor's Ev. 1157, sec. 1273) speaks of the baptismal registration of a child as illegitimately born as *some* evidence of illegitimacy, being regarded as evidence of the reputation in the parish. The principal questions were, whether Marr had opportunities of access to her at the period when conception must have taken place, and whether the defendant was his child—not whether her mother had had connexion with another person. And, so far as the latter question was material and auxiliary to the consideration whether the defendant was the legitimate offspring of Marr and her mother, I do not think it was to be determined by rumours, or current reports, or general reputation in the neighbourhood, that Smoke had had carnal knowledge of her at or about the period of conception. It was to be shewn by special circumstances reasonably leading to such a conclusion—not by vague rumours or suspicions.

2ndly. I think also, that the learned judge correctly rejected the offered proof of the report in the neighbourhood as to the cause that impelled Lawrence Marr to commit suicide. It would, if emanating from anything he had said,

be objectionable, as infringing the rule that the presumed parent of a child born in lawful wedlock shall not be allowed to bastardize his own issue by denying sexual intercourse with the mother, if in a situation to have had sexual access to her—*The King v. Reading* (Hardw. 79), *Rex v. Roak* (1 Wil. 340), *The King v. The Inhabitants of Kea* (11 East. 132), *Cope v. Cope* (5 C. & P. 604), *The King v. The Inhabitants of Sourton* (5 A. & E. 180), *The Queen v. The Inhabitants of Mansfield* (1 Q. B. 444).—If mere surmise amongst the neighbours, it would be still more objectionable.

3rdly. With respect to the refusal of the learned judge to compel Smoke to answer the question put to him at the peril of commitment for contempt, it seems the learned judge thought him intoxicated and by no means in a condition to give evidence at all. However, the provincial statute 32 Geo. III., ch. 1, sec. 5, enacts, that all matters relative to testimony and legal proof in the investigation of fact and the forms thereof should be regulated by the rules of evidence established in England; and it is on such rules that a witness is not compellable to answer where the answer would have a tendency to expose the witness to any kind of criminal charge, whether at common law or in the ecclesiastical courts—*Parkhurst v. Lowten* (1 Mer. 391, 2 Swan. 215), *Brownsward v. Edwards* (2 Ves. Sr. 245), as for simony; *Chetwynd v. Lindon* (Ib. 450-1), for incest; *Finch v. Finch* (Ib. 493), as to concubinage; *Taylor's Ev.* 969-70, sec. 1068, Ib. 973, sec. 1073, and see secs. 1068, 1066; *The King v. Martyr and Fulham* (13 East. 58, note), *Dodd v. Norris* (3 Campbell 519), where, in an action for seduction, the female seduced was, by Lord Ellenborough, held not bound to answer whether she had had criminal intercourse with other men; but in *Verry v. Watkins*, (1 C. & P. 308), such question was allowed to be put and was answered. A similar rule prevails where questions are put degrading to the character of the witness. He may answer, but will not be forced to answer.

With us there are no means of prosecuting a party for fornication as an ecclesiastical offence; but I am disposed to think that a witness being, by the rules of evidence and

the law of England, privileged from answering a question imputing or seeking to elicit from him an admission of such an act as would impute a scandal upon the witness, it was, under the circumstances of this case, in the discretion of the learned judge to refrain from compelling an answer by commitment for contempt of court, however admissible the evidence might have been had the witness voluntarily answered the questions put to him.

Besides, the rule is not moved upon any ground that involves the point or relates to Smoke's contumacy as to his competency to give evidence, either as respected his sobriety or his intercourse with the defendant's mother, or to the duty of the learned judge to have enforced answers from him by coercive measures. He did not reject his evidence.

4thly. The only remaining ground is the rejection of evidence of resemblance, which involves three questions—1st. Whether proof of resemblance was admissible at all. 2nd. If it was, whether it was improperly rejected when offered. 3rd. And if so, whether rejection at that time entitles the plaintiff to be relieved from this nonsuit under the circumstances attending it.

1st. Resemblance of a child to the alleged father does not seem to have been often given in evidence. In actions of crim. con. it would often be inadmissible. It was incidentally proved and remarked upon in a case of seduction—*Andrews v. Askeg* (8 C. & P. 7). In questions of legitimacy it certainly has been received as relevant to the question of non-access. Lord Mansfield dwelt upon it in the *Douglas* cause. It was received by Heath, J., in *Doe ex dem. Day v. Day*—See *Willis on Circumstantial Evidence*, p. 123. It was also received upon the several trials of the case of *Morris v. Davies* (3 C. & P. 215, 427, 5 C. & F., p. 175, 184, 197, 198, 208, 229, 239): and although not remarked upon in delivering judgment, it was probably owing to its effect being neutralized by opposing evidence. See also, Sir H. Nicholay's *Treatise on Adulterine Bastardy*, which I have not had an opportunity of examining; Lord Campbell's *lives of the Chancellors*, 6 vol., p. 637, note

referring to the case of *Morris v. Davies*; *Doe dem. Mudd v. Suckermore* (5 A. & E. 745). Governed by such authorities as I have had the opportunity of consulting, this proof, so far as I can perceive, appears to me admissible when relevant to the issue.

2nd. If so, I think it might have been, and (though doubtful) that, in strictness, it ought to have been, received at the time it was offered in the present case. It was a question depending upon circumstantial evidence, and a most material fact being whether the conception took place *before* or *after* Lawrence Marr's return from Port Dover. Resemblance to Smoke would not, in the first instance, have been relevant or admissible. It could only become so as auxiliary evidence after a sufficient foundation had been laid to raise suspicion pointing to him—Best on Evidence, 32, 39, 95, 97, 278, 279, 285, 290, 291; Taylor's Evidence, 58, 59, 233, 236, 244. But I think a sufficient foundation had been laid. There was evidence from which the jury might have found that the defendant was, at her birth, on the 10th June 1832, a full grown child: whence, allowing 40 weeks or 280 days for the regular period of gestation, it would follow that conception probably occurred in the early part of September 1831; or allowing 9 months of 30 days each or 270 days, about the middle of that month. Roll. Ab. 356, *Alsop v. Bowbrell* (Cro. Jac. 541), *Theaker's* case 686; Co. Lit. 123, a. There was also evidence from which the jury might have been satisfied that Lawrence Marr did not return till the latter end of September or the 1st of October. There was, moreover, evidence that about the middle of September, and before Marr's return, Smoke was upon such terms of intimacy with the defendant's mother that he was supposed to be sparking or courting her; and not only was invited by her to a paring-bee, as it was called, but remained behind when the rest of the company departed, between twelve and one o'clock at night, and when her parents were absent, and no other person there older than a young sister twelve or fourteen years of age. Now, if to such circumstances were added proof of strong resemblance to Smoke and none at all to Lawrence Marr,

the whole together might have satisfied the jury of ante-nuptial conception, and of the absence of sexual access by Marr previous to and until after such conception. Without it the evidence would probably have been deemed quite insufficient.

One way of testing the weight of the evidence would be to suppose it an action of seduction against Smoke, and that the mother of the child was dead, or, if living, not called—Holt N. P. C. 451. That there had been a seduction, and a child born, would be clear: the only question would be, who was the seducer—would resemblance have been admissible in addition to the other evidence, with a view to bringing it home to Smoke? Of course it is not precisely the same here, because a presumption as to Marr arises in construction of law, from the marriage, that would not otherwise have existed; and the evidence would plainly be insufficient to implicate him as the father if there had been no marriage. It could not be necessary to give *prima facie* evidence of sexual intercourse between Smoke and Elizabeth Bunker before proof of resemblance could be received. That was the ultimate object; and it was, I think, enough to make a case of reasonable suspicion, to render it relevant and material to the issue. And, so far as resemblance might contribute towards proof of sexual access, it equally tended to shew that Smoke was the father, and not Marr.

Had a nonsuit been taken at this stage of the case, I should have been much disposed to hold it wrong. I think a bill of exceptions might have been tendered, which, though not a universal test, is often a good test—Chitty Prac. of the Law, Tit. "New Trial," p. 45, Robinson v. Williamson (9 Price 136), Harford v. Wilson (1 Taunt. 14), Doe ex dem. Lord Teynham v. Tyler (6 Bing. 561), Bowers v. Evans (1 M. & W. 214), Alexander v. Barker (2 Tyr. 140, 2 C. & J. 133), Crease v. Barrett (1 C. M. & R. 933, 5 Tyr. 458, 475), Tyrwhitt v. Wynne (2 B. & A. 559), Doe ex dem. Welsh v. Longfield (16 M. & W. 515-6).

The learned judge, although he thought the preliminary

evidence insufficient to render the proof of resemblance relevant, did not absolutely hold such proof to be inadmissible under any circumstances. And the plaintiff's counsel proceeded with a view to enhance the suspicion against Smoke; but he merely gave further evidence of intimacy, and that the parties had been frequently seen together without anything improper being observed, and, in attempting to carry it further by calling Smoke, any improper intercourse upon the night of the bee (which occasion constituted the principal ground of suspicion) was positively denied by Smoke himself. Unless therefore, his conduct as a witness, and his evasive answers as to access at other times, tended to confirm suspicion, the force of it was diminished in relation to the most suspicious circumstance otherwise appearing. Consequently, at the end of the plaintiff's evidence the aspect of the case had been changed, if not weakened. Something had been added and something detracted, and the learned judge was not asked to pronounce upon the sufficiency of the case, at that stage, to admit evidence of resemblance: nor do I see that we can be called upon to decide whether he ought then to have admitted it, had it been tendered. It was not offered, nor was he requested to receive it. And, putting ourselves in his place for the moment, what his final ruling would have been had the evidence been again offered, we cannot tell.

3rd. What motives influenced the plaintiff's counsel in electing a nonsuit; whether he preferred that course rather than risk the case with the jury, accompanied by strong observations from the bench against the conclusion he wished to establish; or whether he inadvertently or advisedly refrained from renewing the offer of proof of resemblance, so as to ascertain the ultimate decision of the court upon the point; or whether he deemed it useless or inexpedient to press it further after the way Smoke had answered and conducted himself in the witness box, is left very much to conjecture. We understand the nonsuit was not in acquiescence, or in abandonment of the case, but with the intention of moving to set it aside upon any grounds that might be held sufficient. But, whatever the motives or

reason may have been, it is certain that the offer of this evidence was not renewed; so that, whether it would or would not have been admitted after the additional testimony had been given, we do not know. The nonsuit was taken without any expressed reference to the previous rejection of such evidence. Had a bill of exceptions been tendered at the end, as it might have been, it would have revived the question. The nonsuit was apparently prompted by considerations operating upon the plaintiff's counsel at the close of his case, upon receiving intimation of the way in which the learned judge contemplated leaving it to the jury.

Such nonsuit having been invited by the plaintiff's counsel, not suggested or directed by the court, I do not feel warranted in relieving against it in a case which seems to me to entitle the defendant to hold the plaintiff strictly to the rules by which applications to set aside nonsuits voluntarily elected are governed.

At the expiration of nearly twenty years after her birth, the plaintiff is attempting to bastardize his supposed niece, with all the difficulties and uncertainties arising from lapse of time, frailty of memory, &c., to be contended with and encountered by her or her guardian (if she has one): and when, at the trial, the time had arrived for her being heard in support of her legitimacy, the plaintiff, without waiting to hear the defence, or permitting her to go into it, withdrew the question from the jury by putting an end to the cause, as it was in his power to do, and without any intimation that the exclusion of evidence of resemblance in the first instance had influenced him in so doing.

Under such circumstances—seeing no other ground upon which the rule to set the nonsuit aside could be sustained except the objection to the qualified rejection of evidence in the progress of the trial, which might have been obviated at the end, had it been then offered, I think the main grounds on which the nonsuit was taken and has been moved against fail: and that the plaintiff cannot now be allowed to fall back and rest upon the doubtful question whether a sufficient foundation had been laid for the admission of evidence of resemblance (assuming it to have been

admissible in itself if shewn to be pertinent to the issue); or whether it ought to have been unhesitatingly received when it was offered, so that its refusal constituted a subsisting objection throughout the cause, without any repetition of the tender.

I do not think the evidence can be regarded as having been rejected in the absolute terms which entitle the plaintiff to set aside the nonsuit on that ground alone.

Upon the whole, therefore, I think the rule should be discharged—*The Irish Society v. Bishop of Derry* (12 Cl. & Fin. 641, 665), *Gibbs v. Pike* (9 M & W. 351, 360-1), *Taylor's Evidence*, 1165-6 and cases cited, note (x).

MCLEAN, J., and SULLIVAN, J., concurred.

Rule discharged.

PULVER V. WILLIAMS.

Money had and received—When maintainable.

Where A. leased to B. a certain house and premises for fifteen years, and during the currency of the term, by agreement entered into between A. and C., reciting that B. had agreed to assign his interest to C., A. therein assented to such assignment, and further agreed that C. should have the option to purchase the fee within one year from date, at a given sum, payable by instalments. At the time of the agreement C. paid to A. 50*l.*, to be on account of purchase money, in case he elected to purchase, otherwise to be absorbed in rent. There was a proviso in the original lease to B. that in the event of the house being burnt the rent should cease. C. declared no intention to purchase, and the premises were afterwards destroyed by fire, at which time, long before the expiration of the lease, the rent due amounted to about 12*l.* 10*s.* C. then brought assumpsit against A. in a county court, and recovered the difference between the 50*l.* paid, and the rent due up to the time of the fire: *Held*, on appeal to this court, that, notwithstanding the proviso in the original lease as to the fire, the plaintiff was entitled to rent until the 50*l.* was absorbed, and that the action therefore was not maintainable.

APPEAL from the County Court of Prince Edward.

Declaration dated the 2nd of December 1851.

This was an action of assumpsit for money had and received, &c. Plea—Non-assumpsit.

The plaintiff claimed 37*l.* 10*s.*, balance of 50*l.* mentioned in an agreement under the hands and seals of the plaintiff and defendant, bearing date the 26th of November 1850, in which, after reciting that the defendant did on the 2nd of October 1843, lease to Thomas Corry the tavern stand

comprising the house and premises on the south-west corner of the main road and the road leading to Bull's Mills, in the village of Bloomfield, township of Hallowell, for fifteen years, at the yearly rent of 25*l.*, payable quarterly; and that Corry had consented to assign the said lease and his remaining interest therein from the 10th of December then next, and to pay the rent to that date; it was covenanted and agreed by the defendant with the plaintiff, that he would consent that the said lease should be assigned to him, and that he, the said plaintiff should have the option of buying the said premises containing one-half an acre of land, at any time within one year from the date thereof, for 275*l.* payable—50*l.* down (the receipt of which sum was thereby acknowledged,) 100*l.* in one year from date, 50*l.* two years, 50*l.* three years, and 25*l.* four years from that date, with interest on each payment; and the said defendant also covenanted and agreed that if the said plaintiff should decline to buy the said stand, that the 50*l.* be held as payment on account of rent, and that interest should be allowed on it until the amount was absorbed in rent; and the said plaintiff thereby covenanted and agreed with the said defendant that he would take from Corry an assignment of the said lease, and would fulfil the conditions therein stipulated to be performed by the said Corry, and would pay the rent which should accrue from the day he took possession of the said land, unless the said plaintiff chose to purchase the said premises at or before the expiration of one year from that date, as was therein before recited, in which case the sum of 50*l.* then paid should be considered the first payment; and the said defendant agreed that if the said plaintiff chose to purchase, he (the said defendant) would give him a good deed in fee simple for the said stand, on receipt of the said payments, or of satisfactory security for the same—said deed to guarantee the premises free from all incumbrances.

The lease, after the execution of the agreement, at the instance of defendant, and with the concurrence of Corry, was destroyed by Corry's wife, and not actually assigned to plaintiff. It did not appear to have been done from any

ill motive on the part of the defendant so far as the evidence explained the act.

Plaintiff entered into possession of the premises, and continued in possession until the 29th of July 1851, when the stand was destroyed by fire.

The original lease to Corry, it appeared, though not clearly, in the evidence, provided that the rent should cease if the house were destroyed by fire during the term.

The judge of the county court, before whom the cause was tried, was of opinion that the plaintiff had a right to recover the difference between the sum of 50*l.* advanced by him to the defendant, and the amount of rent from the 10th of December until the time of the fire; and that during the time the plaintiff held the premises he held them on the same terms as Corry did, and subject to the proviso in Corry's lease, that the rent should cease in the event of the house being burned, although that lease, for the reason already given, had not been actually assigned to him.

The jury, under this direction, found for the plaintiff, 37*l.* 4*s.* 8*d.*

The defendant appealed against this verdict.

Richards, for the appellant, contended that the main question was whether plaintiff was entitled to recover back a portion of the 50*l.* which he claimed, although by the lease to Corry the rent was to cease in the event of a fire, that proviso being superseded by the subsequent sealed agreement. He referred to *Baker v. Holtzaffell*, 4 Taunt. 45; *Izon v. Gorton and another*, 5 Bing. N. S. 501, 7 Scott 637; *Packer v. Gibbins*, 1 Q. B. 421—to shew under what circumstances the rent may cease: and contended that in this case the defendant could not, after the fire, sue for rent, but nevertheless might retain what had been already paid, to go on account of rent in a certain event: that the agreement and lease were not so connected as to ingraft the exception upon the 50*l.* paid: that it was not contemplated that any of the 50*l.* should be returned; no provision was made for it—and it could not be implied—that the consideration did not entirely fail, and unless it did the plaintiff could only sue upon the special agreement for some breach

thereof : but that there had been no breach, on the defendant's part, and part of the consideration was the right of pre-emption for a year, during which the defendant could not have sold the reversion to any one else : that, had the bargain been with the original tenant, Corry, and he had paid the 50*l.*, no part could be recovered back by reason of a subsequent fire ; it was virtually a payment in part of the purchase money for the fee, if the plaintiff elected within a year to take the fee ; if not, it was to be absorbed in rent—not restored ; one thing in the alternative the plaintiff might have had—viz., the fee ; and if declining that, and the other could not be accomplished, it was no reason for returning the money, so long as the defendant was in no default. There was no express promise to return : if there was it is under seal, and the action of assumpsit will not lie, or if not, the law will not imply one upon a failure on the defendant's part, or upon a failure of consideration which could only arise from some breach or default on the defendant's part, or by reason of an event not provided for, and not going to the whole consideration : that the terms of the lease were very imperfectly stated, and the probability was that in so long a term the rent was only to be suspended until the defendant rebuilt, not to cease, and the term for so many years to continue rent free : that there is no proof of a demand before action brought, or that the plaintiff elected not to buy within the year, and gave notice thereof.

Adam Wilson, for respondent, contended that the plaintiff was bound to elect within the year, and not having done so, must be taken to have declined, as he could not elect afterwards, and so no notice or demand was necessary, the action having been brought since the end of the year.

He recited the agreement passage by passage, to shew that the alternative respecting a purchase was at an end, and might be rejected, which would reduce it to the mere question of rent, and assimilated it to a case of rent paid in advance, subject to the contingency of fire : that not having been expressly or impliedly provided for in the agreement, but the rent ceasing by the terms of the lease, the law implies a proviso to repay money which could not be absorbed in

rent, and which therefore the defendant has no right *ex aquo et bono* to retain, otherwise the principal must remain permanently at interest, as interest was to be paid till the principal was absorbed in rent, which never could happen ; so that unless both principal and interest were to be absorbed in rent, or the interest was to cease, plaintiff was to be entitled to recover : that debt or assumpsit may be sustained as arising out of the transaction—*Suffield v. Barkerville*, 2 Mod. 36 ; *Yates v. Aston*, 4 Q. B. 182 ; *Platt on covenants* 36 : that if 50*l.* was paid upon a covenant to be retained till absorbed in personal services, and the party died when the undertaking was only partly performed, an action would lie for the surplus against his executors : that it was not a condition or defeasance on which covenant would lie ; and the consideration *quoad* the balance entirely failed, the payment not being necessarily entire but divisible—3 Sal. 108 : that the 50*l.* having been agreed to be absorbed in rent, and the rent ceasing, so that it could not be absorbed, the law implies a promise to repay the balance.—9 A. & E. 542 ; *Hall v. Morley*, 8 U. C. R. 584 ; and he referred to cases cited in *Barkerville & wife v. Corbett*, argued the same term.

Richards, in reply, said it could not be gathered that it was the plaintiff's money ; and if not, no agreement to pay could be implied. He repeated that the consideration for the 50*l.* included the right to purchase in fee within a year, and not merely that it was to be absorbed in rent, and therefore it had not failed entirely, or to any divisible or definite extent : that the plaintiff might have purchased within the year, but waived that, and then seeks to recover back the money, because since it began to be absorbed in rent a fire occurred, upon which, by the original lease the rent was to cease : that he agreed it should be absorbed in rent, wherefore the proviso was superseded, and rent should go on till it was so absorbed.

MACAULAY, C. J.—I cannot perceive any ground that I think entitles the plaintiff to recover.

1st. As rested upon the agreement : If it contains an implied undertaking to repay the balance in the event of

the contingency that has occurred, the action should have been covenant ; but that has not been contended.

2nd. Brought as the action is, for money had and received, it can only be supported upon an implied promise in law to repay the amount not absorbed in rent at the time of the fire as upon a consideration that failed entirely, or to some definite amount : and the question is, whether the law does, under the circumstances, imply that promise, for there is no express one entire.

I do not think there has been a failure of consideration to any definite amount. The money was paid under a special sealed agreement. The consideration on the defendant's part was, consenting to the plaintiff being assignee of Corry's lease for fifteen years ; and agreeing to sell the reversion of the demised premises in fee, for a specific sum, to be paid by specified instalments, if the plaintiff elected to purchase it within a year ; and if he elected to do so, then that the 50*l.* paid down should be the first payment, and to allow the plaintiff one year to make his election, and if he declined then, that the 50*l.* should be held as payment on account of rent, and that interest should be allowed on it till the amount was absorbed in rent.

The consideration on the plaintiff's part was to pay down the 50*l.*, to accept an assignment of Corry's lease, to pay the price agreed upon if he elected to purchase, and if he declined, then to fulfil the consideration stipulated in the lease to be performed by Corry, and to pay the rent which should accrue from the day he took possession. Now, a part of the consideration for this 50*l.* was a right to purchase within the year ; during that length of time the defendant was prevented from selling, and if not thus restrained he might have sold before the fire ; the plaintiff had that benefit and option, and had he adopted it the 50*l.* would at once have been absorbed in the purchase money, but he did not choose to avail himself of that privilege ; therefore, he in effect elected the other alternative, to continue tenant and pay the rent. Although he did not actually become assignee of Corry, he entered under a contract for an assignment, which may have been prevented or delayed by

reason of the defendant having burnt the lease ; but it does not appear that he did so from any ill motive, so far as the evidence explains the act, and he is not therefore to be regarded as a spoliator. The defendant waited a year to allow the plaintiff to make his election, and assented to the plaintiff's possession and enjoyment, as expecting to become assignee. The agreement was partly performed by both parties—neither can now be placed in *statu quo*. The right of pre-emption was part of the consideration moving from the defendant, and acquired by the plaintiff ; it pervaded the whole 50*l.* as the consideration on plaintiff's part, and cannot now be applied to one portion more than another. It was not a mere advance of 50*l.* on account of rent : there was a further consideration now past, and which cannot fail or be subtracted to any definite amount. The restriction from selling, may, as things have turned out, have been of more damage to the defendant than the whole 50*l.*—at all events, he lost all other opportunity of selling for a year—or it might have turned out that a purchase would be far more beneficial to the plaintiff than the price would be to the defendant. Further, regarded as a mere payment of rent in advance, it would override the proviso in the lease for the cesser of the rent. Rent already paid could not afterwards cease. Then, as a mere deposit on account, till absorbed in rent, it seems to me to amount to the same thing, *quoad* the 50*l.*, the proviso for cesser of the rent in the event of a fire, was *pro tanto* waived. It would not, under this new subsequent arrangement cease, till the 50*l.* was absorbed. Moreover, the proviso on that head is not clearly proved ; the rent ceasing would not end the term ; the house was insured by the defendant ; the insurers might elect to rebuild, or the defendant might rebuild if not bound by the lease to do so within a reasonable time ; and it cannot be supposed that Corry or the plaintiff were to hold and enjoy either the premises as they were after the fire, or the new buildings, if erected, rent free until the end of the fifteen years, yet this in effect is what the plaintiff contends for. The taking care of the doors, and selling some of the old bricks by the defendant after the

fire, as appeared from the evidence, did not cancel or put an end to the term. For all that appears, the plaintiff might bring ejectment in Corry's name—if not his own. He could still obtain an assignment of the term from Corry—the destruction of the lease would not prevent it—the defendant's assent to such an assignment formed part of the consideration for which the 50*l.* was paid.

There does not therefore appear to me any ground of action either upon an implied covenant, or an implied promise in law to return the money. The defendant has adhered to his contract: he has not broken it so as to entitle the plaintiff to put an end to it. He is not entitled to put an end to it of his own election; and if the plaintiff does not obtain all he bargained for, he has obtained a portion thereof in several respects that cannot be apportioned; and I consider the defendant entitled to the rent until the 50*l.* is absorbed, notwithstanding the proviso in the lease, and the fire, unless it is to be considered the plaintiff's money, or as money had and received—that is, held to the plaintiff's use—from the beginning, the action fails.—*Chappell v. Poles and another* (2 M. & W. 867.)—And it was not so held during the first year. Paying interest till absorbed in rent may import it as so held when it became a deposit on account of rent; but I do not think it was at any time, after being paid upon the agreement, the plaintiff's money or held to his use, except for the special purpose of being applied to the purchase of the fee, or absorbed in rent.

I think, therefore, the judgment of the county court should be reversed, and a non-suit entered.

McLEAN, J., and SULLIVAN, J., concurred.

Judgment reversed.

See *Edwards v. Bates & Savery*, 7 M. & G. 590; *Middleditch v. Ellis*, 2 Ex. 633; *Simmonds v. Wood*, 5 Q. B. 170; *Doe Gray v. Stanton*, 1 M. & W. 701, 2; *Tarte v. Darby and another*, 15 M. & W. 601; *Taylor v. Hare*, 1 N. R. 260; *Rosthechild v. Hennings*, 9 B. & C. 470; *Lutt et al. v. Cassanet*, 4 M. & G. 898; *English v. Blundell et al.*, 8 C. & P. 332.

MCFARLANE V. MARTIN AND ANOTHER.

Evidence—Admissibility of, to rebut a new case.

Where in an action for goods sold and delivered plaintiff made out a *prima facie* case through his clerk, who proved a delivery of the goods, and the promise to pay on request implied therefrom was repelled by defendant, who stated a special contract varying from that implied: *Held*, that plaintiff was admissible to reply to the new case set up by defendant: and *semble*, he could not be excluded as a witness by reason of his presence in court during the examination of his clerk.

The facts are stated in the judgment.

MACAULAY, C. J.—This was an action for scythes sold and delivered; a dispute arose about the price of some of them, but the jury made the deduction in defendant's favor, and found for the plaintiff only for the balance, 60*l.* 15*s.* 5*d.*

The defence going to the whole cause of action was, that they had been sold upon credit, and that the action had been brought before it had expired. On this point there was conflicting evidence, and indeed opposing evidence, but the jury found for the plaintiff—that is, a sale without credit; and (having tried the cause) I do not think the verdict should be disturbed on this ground.

The plaintiff was himself called in reply to the evidence of the defendants.

The plaintiff's case was made out *prima facie* by a clerk, who stated a case of goods sold and delivered, upon which the law would raise a promise to pay on request. One of the defendants, in his own behalf, stated that they had been sold at four months' credit, and so set up a special contract against that implied by law. The plaintiff was called to rebut it. He was objected to on two grounds:—1st. As having been in court during the trial. 2nd. As the evidence was inadmissible in reply.

As to the first, he said he had been in court during the examination of his clerk—his only witness in chief—but not during the examination of the defendant as a witness in his own behalf on the defence. I thought him admissible, and received his evidence.

The verdict is now moved against on the above grounds, I still think he was admissible to reply to the new case set up by the defendants.—Doe dem. *Osborne v. McDougal*

et al. (2 U. C. R. 135), 3 Chit. Prac. of the Law, 909; Rex v. Hilditch et al. (5 C. & P. 299), where Taunton, J., is reported to have said that that which goes to cut down the case on the part of the defence, and that only, without being any confirmation of the case on the part of the prosecution, is admissible in reply.—Rex v. Stimpson (2 C. & P. 415), Taylor's Ev. 276, sec. 284; Briggs v. Aynsworth et al. (2 Mood. & Rob. 168, and note.)

And I am not aware of any rule or authority by which he could be excluded as a witness by reason of his presence in court during the examination of his witness in chief; he was not present to hear the defendants' evidence, which he was called to rebut.

Rule refused.

MCMAHON V. GROVER.

Vendor and vendee of logs severed from the realty—Title paramount.

A. agreed to sell to B. a lot of land, and to give him a deed upon payment of a certain price by instalments. B. went into possession of the lot, but made default in the payments, whereupon A. conveyed the same lot by deed to C. B., being still in possession, after default and after the conveyance to C., cut timber on the lot, and sold the logs to D., who had no notice of C.'s title. C. brought ejectment against B., laying the demise at a period antecedent to the cutting of the timber, and recovered. He then gave notice to D. not to pay any more money to B. on account of the logs, but to pay the balance due to him C. B. sued D. in assumpsit for the price of the logs, and D. set up, as a defence, the notice and the paramount title of C.: *Held*, defence good, the rule of *caveat emptor* and of *estoppels* not applying strictly in this case.

Writ issued 21st July 1852.

Declaration dated 21st August 1852.

Special Case—Assumpsit, for goods sold and delivered, &c. Plea—That plaintiff pretended to own the goods; well knew at time of sale that he did not own them, and had no right to sell, and that one Campbell owned them; that defendant had no notice thereof at the time of sale, but believed the plaintiff to be the owner; that Campbell was the owner, and after such sale and delivery gave defendant notice, and then required and still requires payment therefor; that before such notice, defendant had parted with the said goods.

Replication, *de injuria*.

The facts stated are—1st. That Eliza Taylor was seized in fee of lot No. 20, 3rd con. Cramahe: 2nd, that she gave a power of Attorney to Geo. S. Boulton to sell the same: 3rd, that on the 8th February 1842, said Geo. S. Boulton agreed to sell the same to plaintiff, in writing, as follows:

“Received of (plaintiff) 2*l.* 10*s.*, on account of one half of lot 20, 3rd con. Cramahe; and, on payment of 2*l.* 10*s.* on or before the 1st May, and 10*l.*, with interest, on or before the 1st August next, 12*l.* 10*s.*, with interest, on or before the 1st February next, and the remaining sum of 47*l.* 10*s.*, with interest, in two annual instalments, from the said 1st February, I will, as attorney for Miss Taylor, the proprietor, execute to him a deed in fee simple of the said land.

(Signed)

G. S. BOULTON,

Attorney for Miss Taylor.

February 8, 1842.”

That plaintiff made default in the payment of such purchase money, except 6*l.* 5*s.*: that after such default, and before the day appointed for the last payment thereof, said Boulton sold the said land to Donald Campbell, and on the 15th January 1845, he as attorney of said Taylor, executed a deed thereof in fee to said Campbell: that in Mich. Term, 1845, said Campbell obtained judgment, in an action of ejectment, against plaintiff, but that issue of execution was stayed by injunction from Chancery: that plaintiff filed a bill in Chancery against said Boulton, Taylor, and Campbell, for a specific performance of the agreement to sell, dated 8th February 1842: that on the 11th of February 1851, he obtained a decree for such performance, on payment of 107*l.* within one month from that date: that the time for such payment was afterwards enlarged until the 9th January 1852, when the bill was finally dismissed, with costs, for non-payment thereof: that about the 1st of November 1851, plaintiff agreed to sell and deliver to defendant the logs in question, at 3*s.* a standard log, the same then growing on the said lot, of which the plaintiff was during all the time aforesaid in possession: that on the 21st December 1851, plaintiff began to deliver said logs, and delivered 654 standard logs, comprising 918 pieces, between the 21st December 1851 and the 10th February 1852, and before the execution of

the writ of possession : that Campbell's attorney gave defendant notice not to pay plaintiff for the logs, as Campbell would look to him for the payment : that on the last day of Hilary Term, 1852—the same day the writ of possession was executed—a verbal notice was given by Campbell to defendant not to pay the money to the plaintiff, but to him ; and that payment to him Campbell has been made since this action was brought : that 34*l.* 17*s.* 10*d.* had been paid by the defendant to plaintiff from time to time during the period of the delivery of the said logs, and on account thereof.

The verdict 37*l.* to stand, if the plaintiff is entitled to recover for the 654 logs delivered ; otherwise, to be entered for defendant.

Eccles, for the plaintiff, contended, that the plea was founded on the case of *Allan v. Hopkins*, 13 M. & W. 94, but that payment before action was a material fact, and was not here alleged—*Lee v. Shore and others*, 1 B. & C. 94 ; *James v. Pritchard* 7 M. & W. 216 : that the rule of *caveat emptor* applies : that plaintiff was in possession of the land—ostensible owner—and defendant knew, or ought to have inquired, of his title : that he might have obtained an interpleader order, and made Campbell a party ; but, having taken the whole on himself, cannot dispute the plaintiff's title or right to recover, merely because of Campbell's notice : that plaintiff held possession under a contract to purchase and a decree in equity, which was title enough to enable him to sell—not being restrained from selling the timber by agreement or injunction.—*McMahon v. Campbell*, 2 U. C. R., 158.

Walbridge, in reply, contended, that the agreement to sell to the plaintiff, of 8th February 1842, did not authorise him to take possession, much less to sell the timber and commit waste ; and that if it had authorised him to enter, his right to hold, as a vendee in possession, ceased, when he made default in payment of the purchase money, according to the agreement, after which he was a mere tenant at sufferance : that some of the logs had been delivered after the ultimate day appointed for payment of

the purchase money, under the decree for specific performance; and that, after being ousted under the writ of *hab. fac. poss.*, Campbell might have brought an action for mesne profits, from the day of the demise laid in his declaration, which must have covered all the period within which the plaintiff had agreed to sell, cut and deliver the trees and logs in question. He rested on the cases cited by the plaintiff's counsel, and cited *Dickenson v. Naul*, 4 B. & Ad., 638; *Morley v. Attenborough*, 18 L. J., Ex., 48, 13 Ju., 282, 3 Ex. R. 500—no implied want of title on sale of goods: that after notice from Campbell, the defendant could not have exonerated himself by paying Campbell; and it therefore created a *locus standi*, on which he could safely rely. It was a sale of timber severed from the realty, to which plaintiff had no title, and as soon as severed the trees or logs, as chattels, vested in Campbell, who owned the estate, though kept out of possession by an injunction afterwards dissolved.

MACAULAY, C. J.—Having looked at the exhibits, it is proper to remark that I do not see the importance of the bill and answer in Chancery in this case; and if the plaintiff recovers, I do not at present think he should be allowed them in the taxation of costs, if obtained merely for the purpose of this case. The agreement might have been proved without them; and, as affecting the title to the trees or logs, I do not think them so material as to justify the expense.

The only difference between this case and that of *Allan v. Hopkins* (13 M. & W. 94), is, that there the subject matter of the action was goods that had never been attached to the freehold, and which had been paid for to the right owner before action brought; while here the action is for timber, consisting of trees severed from the freehold, and for which the defendant had not paid at the time the action was brought, though he had since paid therefor to the right owner before the trial—whether before plea or not not appearing.

Referring, in addition to the above, to the cases of *Dickenson v. Naul* (4 B. & Adol. 638), *Hardman v. Will-*

cock (3 Bing. 378, note), *Lee v. Shore et al.* (1 B. & C. 94), *Wilson v. Anderson* (1 B. & Adol. 450), *James v. Pritchard* (1 M. & W. 216), *McMahon v. Campbell* (2 U. C. R. 158), *Morant v. Sign* (2 M. & W. 95), *Morley v. Attenborough* (3 Ex. R. 500), *Walker v. Mallon* (2 C. & K., 346), *Beltoley v. Read* (4 Q. B. 517).

It seems to me the plaintiff is not entitled to recover.

The rule of *caveat emptor* does not apply as laid down by Pollock, C. B., in *Allan v. Hopkins*; and although the general or *prima facie* rule is, that an agent, bailee, or vendee, cannot resist his principal, or dispute the title of the bailor or vendor, still, if a paramount owner steps in and forbids the bailee returning the goods at his peril, or the vendee paying the price, and the bailor or vendor had no right or title, it appears to me the bailee or vendee may then resist his principal. He does not nor could he do so of his own mere motion; but where a third party intervenes, such party being the true owner, the defendant may set up the *jus tertii* as a defence.

I do not think it depends upon payment in the case of vendor or vendee, but upon the notice and demand of the real owner.

If in this case Campbell could bring trover against the defendant, or recover against him for goods sold and delivered after the notice given, the defendant's only safety is to refuse payment to plaintiff; he is not estopped from disputing his title; and payment cannot enhance his defence, that I perceive. If the defendant is not liable to Campbell, after notice, payment subsequently would be in his own wrong; if liable to him, in trover, payment, even before notice, would not constitute a defence, except in so far as it might contribute to aid him in controverting Campbell's right of property and possession. If the defendant is not liable to Campbell, payment to him will not extinguish his liability to the plaintiff; if he is liable to Campbell, non-payment to Campbell will not render him liable to the plaintiff. The defendant could not enhance his own case by his own voluntary act, after knowing the right was disputed.

If the defendant had paid plaintiff before notice from Campbell, and he was suing as plaintiff, it would be another thing ; but, situated as the parties are, I cannot see that it can make any difference ; although it is certainly dwelt upon as a strong circumstance in some of the cases. Liability to pay seems to me equivalent to payment, as relates to the question at issue—namely, whether the defendant can dispute the right of his vendor to recover by setting up the *jus tertii*.

Now, that the defendant is liable to Campbell, seems to me clear. The estate on which the trees grew was his ; he had judgment, in ejectment, against the plaintiff, under a demise relating to a period long before the trees that form the subject of this action were cut or sold, and embracing the time when they were cut and sold ; he was restrained from taking a possession to which he was by law entitled, under an injunction from Chancery—at law, however, Campbell had the property and right to possession of the trees when standing ;—the injunction from Chancery did not authorise the plaintiff to commit and waste—and cutting and selling the trees was waste,—for which he became liable to Campbell in an action of trespass for mesne profits after he acquired possession under the *hab. fac. poss.* : when severed from the freehold, the trees became personal chattels ; and the property and right of possession being in Campbell, the law vested the property therein in him forthwith ; when, therefore, the timber or logs were by the plaintiff sold and delivered to the defendant, the plaintiff was wrongfully converting Campbell's goods, and both incurred liability to an action of trover. But Campbell might waive the last, and adopt the sale—treating the act of the plaintiff as one of agency on his behalf—and sue the defendant for goods sold and delivered. This appears to me the legal effect of what was done ; and if I am correct in this view, it follows, I think, that the notice from Campbell defeated any presumption of title in the plaintiff founded upon his possession, and by reason of the injunction in Chancery, which had been dissolved before such notice ; and that, if

the defendant afterwards paid the plaintiff, it would be at his peril ; and, even on recovery in this action, since such notice would not conclude Campbell in any action he may hereafter bring.

The cases of *Dixon v. Walker* (7 M. & W. 214), and *Paterson v. Campbell* (12 M. & W. 278), shew the defendant could not obtain an order upon Campbell to interplead in this action.

As to the alleged duty of the defendant to have inquired into the plaintiff's title being real estate, at the time of the contract to purchase, I think he might, if acting *bona fide*, suppose the plaintiff entitled to sell the trees—seeing him in possession ; and even if the plaintiff could not be held to warrant the title, it is probable that, had the defendant paid him, and afterwards been made responsible to pay Campbell, he might have recovered back the money from the plaintiff, as money had and received to his use, as upon a total failure of consideration.—*Morley v. Attenborough* (5 Ex. R. 500). Had the defendant been told by plaintiff the exact nature of his title or interest in the premises, and left it to himself to buy, relying upon it, or not to buy, at his discretion, and the defendant had with such notice elected to buy, I think he would have been estopped from disputing the plaintiff's right to the purchase money ; but that is not the case. There is no proof of his having purchased at his own risk as to the sufficiency of the plaintiff's title and right to sell. I think therefore the verdict for the plaintiff should be set aside, and a verdict entered for the defendant, according to the leave reserved at the trial.

McLEMAN, J., and SULLIVAN, J., concurred.

Verdict to be entered for defendant.

BROUGHAM V. BALFOUR.*Partnership—Non-joinder.*

A. and B. being partners, A. alone verbally leases certain premises for a place of business, for a term of five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A., but never signed by the lessor. It was verbally agreed between the lessor and A. that A. should erect a granary, &c., on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved, and B. releases and assigns to A. all his right to debts, &c. A. then takes C. into partnership, with whom the lessor settles the account for the goods by allowing an alleged set-off. A. afterwards brings an action against his lessor for the goods sold, and the value of the granary, &c. *Held*, 1st. that B. should have joined in such an action. 2nd. That the settlement with C. was not *bona fide* as against A. 3rd. That no lease having been executed upon the facts, A. was a tenant at will, and that it might be orally agreed that he should make improvements and be paid for them, and that plaintiff might sue for them in his own name though built with partnership funds.

Quære.—Whether should the action be for work, labour, and materials, or upon the special agreement?

This was an action of assumpsit for goods sold and delivered, work and labour, and materials, &c.

Pleas.—Non-assumpsit, payment, and set-off.

The case was tried before Mr. Justice Burns at the last Toronto assizes, when it appeared in evidence that the plaintiff was formerly in partnership with a person named Lamphere, in mercantile business: that in 1850 he verbally agreed with the defendant to rent from him certain premises in the Gore of Toronto, for the purposes of a shop and place of business, at a certain yearly rent: that the defendant agreed that the plaintiff should erect certain additions—granary and verandah, &c., on the same premises, for which the defendant undertook to pay—it was said when the lease expired—but no distinct proof thereof appeared except as it was to be inferred from the unsigned lease put in: that the plaintiff entered into possession and carried on partnership business thereon, and erected the granary and verandah, and had paid the rent regularly, but received no written lease, although he had prepared one and delivered it to the defendant, who had not returned or executed it. The rent was paid out of the partnership funds, and the additions made were paid for out of like funds.

During such partnership the defendant had purchased goods of the firm of Brougham & Lamphiere to the amount of 11*l.* 19*s.* 7*d.*, and the expenses of the verandah, exclusive of the granary, amounted to 11*l.* 9*s.* 9*d.* These two items, with 25*l.* 5*s.* 9*d.* for the granary, formed the plaintiff's demand in this action.

As to the first: it appeared that the plaintiff and Lamphiere had dissolved partnership before the action brought, and that it was agreed between them that the plaintiff should collect the debts due to the firm: that the plaintiff afterwards sued the defendant in the Division Court in his own name: that the defendant did not object the non-joinder of his late partner, but asked time to procure proof of a set-off, which was granted, but the suit was withdrawn, and did not afterwards proceed: that the plaintiff afterwards entered into partnership with one Burrill, to whom the defendant had paid the amount of this part of the plaintiff's demand before this action, but his authority to receive such payment was denied.

The defendant denied the plaintiff's right to recover for the verandah, &c., in his own name—or without proof of a written agreement therefor—or until the end of the yearly term existing at the time the action was brought.

Upon reference to the notes of evidence and the exhibits, the facts may be stated with more particularity, as follows: That in the first instance, the defendant in the spring of 1850, agreed verbally with the plaintiff to lease the premises to him for five years, at 35*l.* a year, with the privilege of taking them for five years more at the same rate, if so disposed: that they afterwards, in the spring of 1850, made a further agreement about a granary and verandah: that the defendant said he had intended putting them up, but had been too much occupied, and that if the plaintiff would do it he would furnish the lumber, and would allow plaintiff for the work done: that the plaintiff did not get possession till September 1850, after which he put up the granary and verandah, the defendant furnishing the lumber: that there never was any written lease, but that the plaintiff drew up a memorandum of lease, and

gave defendant a copy, and tendered it for execution in August 1851, the granary being then nearly ready. The draft of lease in duplicate was to the plaintiff alone, from the 1st of September 1850, for five years, at 35*l.* a year, with renewal for five years more if desired by the plaintiff, and the defendant to *allow* the plaintiff, *at the expiration of his lease*, the full value of all permanent improvements which he might add to the premises. This memorandum is dated 1st of May 1851, and was to stand as equivalent to the lease until such time as it should be perfected. The memorandum included the use of a driving shed, about which some misunderstanding arose, the defendant having leased it with a tavern, and the plaintiff expressing himself willing to be restricted to a convenient part of it : that the defendant took away the memorandum of lease, and had not signed it before the action, but had said in September or October 1851 that he would not sign it. After this the plaintiff went on and finished the granary, and put up the verandah, the cost of the granary being 25*l.* 5*s.* 9*d.*, and of the verandah 11*l.* 7*s.* 8½*d.* : that the rent from the 1st of September 1850 to the 1st of September 1851, was paid by a store account contracted by the defendant with the plaintiff and Lamphiere, leaving a balance in their favour, which formed part of the 11*l.* 19*s.* 7*d.*, and the residue was incurred up to 1st of January 1852, and in cash for the year ending 1st September 1852. The partnership was dissolved on the 1st of January 1852, by deed indented, and whereby Lamphiere released to the plaintiff all his claims and right to the stock and debts of their partnership business carried on as merchants in and upon the premises, known as the Commercial House, Village of Stanley Mills, Gore of Toronto, and all other matters in connexion there. with ; and authorised the plaintiff to collect all debts due to them, and contracted while trading under the firm of Lamphiere & Brougham, and to apply the same as he deemed proper. The plaintiff then covenanted to pay all debts due by the firm, &c., and to indemnify Lamphiere therefrom, and also to make him certain payments periodically, as therein provided and expressed. The plaintiff alleged as

a witness, that Lamphiere had nothing to do with renting the premises or the erection of the granary and verandah. The notice of dissolution was published in a newspaper called the *Mirror*, dated 13th of February 1852; the notice, dated 1st of January 1852, and receipt, was put in, dated 1st of September 1852, signed by the defendant for 35*l.*, one year's rent, as received from plaintiff; also the account for 11*l.* 19*s.* 7*d.* as due Lamphiere & Brougham, the first item being balance of account rendered 10th of September 1851, and ending 29th of December 1851. This was annexed to another account headed "Commercial House, &c., March 9th, 1852—George Balfour, (defendant).

| 1852. | To BROUGHAM & BURRILL, | Dr. |
|-----------|---|----------|
| Jan. 1st. | To amount of account rendered—due the late firm of Lamphiere & Brougham..... | £11 19 7 |
| | Then some additional items in February and March. | |
| | Amounting in all to..... | £16 7 7½ |

These accounts were made out in the plaintiff's handwriting, as he admitted. There was a receipt indorsed thereon in a different form of handwriting, dated "Gore of Toronto, June 22nd 1852," for 9*l.* 3*s.* 6*d.*, together with a claim of 3*l.* 5*s.* 6*d.*, signed, "Brougham & Burrill," in the same handwriting as the indorsement; and on the face of the account, in the same handwriting, is entered a credit of 6*s.* 3*d.* postage. The plaintiff said, that after dissolving with Lamphiere he entered into partnership with Burrill, but considered it dissolved in May; and a printed notice was with the exhibits, dated "Commercial House, Stanley Mills, 1st June 1852," with plaintiff's name thereto, for bidding persons indebted to him settling with any person pretending to have the power of doing so, as he never authorised any one to collect money or pass receipts on his account, &c.

A non-suit was moved, on the grounds—

1st. As to the whole claim or partnership with Lamphiere, and so a non-joinder.

2nd. That it was an agreement relating to an interest in lands requiring written proof under the Statute of Frauds.

3rd. That no action could be maintained for the improvements to the premises until the expiration of the term, which still continues; and the plaintiff was in possession, and enjoying, &c., and while so his only remedy would be special for not giving a lease.¹

The learned judge, on the third point, ruled that the plaintiff could not recover for the granary and verandah while he continued in possession of the premises, although the defendant had failed to execute a lease, but that the case was to go on as to the residue, the learned judge yielding to the authorities cited, though not satisfied on that head.

Burrill was then called, and denied that his partnership with the plaintiff was yet dissolved, and said that the defendant had paid him the amount of the account on the 22nd of June last. He, however, admitted seeing a notice of dissolution in the paper, published by the plaintiff on the 1st of June 1852, but could not say whether the defendant had seen it or not: that the notices were posted up. The credit allowed defendant was a set-off he had against Lamphiere and plaintiff, the balance paid in cash. This was after the plaintiff had sued the defendant in the Division Court; but the receipt was signed the same day it was before the Division Court, the defendant having paid after the adjournment. He supposed the defendant was aware of a dispute between the witness and plaintiff: that they had a dispute in May. The learned judge ruled that there was no sufficient evidence of fraud to invalidate the settlement with Burrill, but he held that the defendant should not have paid Burrill after defending the suit in the Division Court.

He also overruled the plaintiff's claim to recover for the granary and verandah, &c., and reluctantly acceded to a verdict in his favor for goods sold and delivered, with leave to defendant to move a non-suit.

Bell, for the defendant, obtained a rule on the plaintiff to shew cause why the verdict should not be entered for the defendant, or why a non-suit should not be entered, or a new trial granted; and during the same term, *Hallinan*,

for plaintiff, obtained a rule to set aside the verdict for misdirection.

Both rules came on together for argument, and the effect of the two seemed to be that if a non-suit was refused, then both parties desired a new trial.

Hallinan shewed cause against the defendant's rule, and contended that the partnership debts being assigned to the plaintiff at the dissolution, he could enforce the same in his own name, without any new promise or recognition of his right as a sole creditor of defendant being proved, relying upon Collyer on Partnership, 597, 617; *Evans v. Silverlock*, 1 Peak N. P. C. 31; *Atkinson v. Laing*, 1 D. & R., N. P. C. 16; *Porter et al. v. Taylor*, 6 M. & S. 156; *Winch v. Keeley*, 1 T. R. 619; *Forth et al. v. Stanton*, 1 Saund. 210, a; *Price v. Leaman*, 7 D. & R. 14.

Bell, in reply, submitted, as clear law, that one of two partners cannot, after dissolution, sue in his own name for partnership debts, merely because the co-partner had released to him without more.—Coll. 595; *Story on Partnership*, 345, 6; *Radenhurst v. Bates*, 3 Bing. 467, 470; *Wilsford et al. v. Wood*, 1 Esp. 182; *Puller et al. v. Roe et al.*, 1 Peak. 260; *Davies v. Hawkins*, 5 M. & S. 487: that *Burrill*, the new partner, had authority to receive payment—*Williams v. Everett and others*, 14 East. 582; *Yates et al. v. Bell et al.*, 3 B. & A. 643; *Gow on Partnership*, 129, 130 (a). He then shewed cause against plaintiff's rule that no term of five years as contemplated, was created, but there was a lease from year to year subsisting; and by the agreement the defendant was not to pay for the verandah till the expiration of the term, and it is not yet ended, wherefore the credit is not yet expired: that the only present remedy is for not giving a lease—*Tinning v. Magrath*, Q. B. U. C., Easter Term 7 Vic., Rob. & Har. Digest, tit. "Assumpsit" I., 1.

Hallinan, in reply, submitted that if, as contended by the defendant's counsel, the agreement for a lease was void, not being in writing—there was no such agreement; and

(a) Payment would be a ground for setting aside the verdict as against evidence, and was not the ground on which leave to move a non-suit was reserved.

as the plaintiff had erected the verandah for the defendant on his premises, at his request, though verbal—he was entitled to recover, as a debt for work, labour and materials, payable on request: that the work being paid for out of the partnership funds was no reason why the plaintiff should not recover in his own name, the agreement being made by and with him solely, wherefore he may sue alone, even though he might have joined his partner Lamphiere, and that there was misdirection on this point.—He cited *Gray v. Hill, R. & M. 420*; *Hoby v. Roebuck & Palmer, 2 Taunt. 157, 2 Mar. 433*: that the plaintiff could not sue the defendant for not giving a lease, for want of a written note of the agreement.

MACAULAY, C. J.—If the case could be sustained by evidence on another trial, I should be unwilling to non-suit the plaintiff.

1st. It appears to me the account for goods sold and delivered to the defendant by the plaintiff and Lamphiere, when in partnership, should be sued for in their joint names, and that there is therefore a non-joinder. I do not think the cases cited can be adopted as authority, to the extent required to support this case. The case of *Evans v. Silverlock* is not like it; and, though much in point as reported, I should expect to find that in *Atkinson v. Laing*, something had occurred between the plaintiff and defendant after the debt had been assigned to the former by his partner, that entitled him afterwards to sue as a sole plaintiff.

The current of authorities is decidedly against the right of one partner to clothe the other with a right to sue alone, by his mere assignment or release, without any privity or consent of the debtor; however, a right in one of several partners to sue alone may exist under articles providing for the business being conducted in his name before the cause of action accrued; or the debtor may have recognized and admitted a liability to one partner alone, after the dissolution.—*Mittleberger et al. v. Merritt et al. (1 U. C. R. 330.)* I think, therefore, the verdict cannot stand.

2nd. But I lay no stress upon the alleged payment to Burrill. It was not payment in full in money, and his

right to admit an alleged set-off as payment is more questionable than his authority to receive the money. But I do not think he possessed either. The settlement was not *bona fide*, and any implied authority from the plaintiff to Burrill to receive the debt by reason of the plaintiff rendering an account in his own and Burrill's name, including this demand, was clearly revoked long before the settlement, with every reason to suppose both the defendant and Burrill were aware of it. The defendant so settled in his own wrong.

3rd. The difficulty with me is, whether the plaintiff is entitled to recover for the granary and verandah in this action. So far as an agreement to perform such work may be made orally is valid, I think it may be so made. The question is, what was the agreement as ingrafted on a demise less than three years, and therefore not required to be in writing by the Statute of Frauds. I think it might be orally agreed that the tenant should add to the building, and be allowed therefor at the end of the lease or term.—*Clark v. Serricks* (2 U. C. R. 535), *Hoby v. Roebuck and Palmer* (7 Taunt. 151, 2 Mar. 433), *Carrington v. Roots* (2 M. & W. 254, 5). According to the evidence, the plaintiff in the spring of 1850 entered into a verbal agreement for a lease for five years, renewable for five years more, and afterwards, before entry, further agreed to erect the granary and verandah, the defendant furnishing the lumber, and to be allowed therefor at the end of the term. He afterwards entered into possession in September 1850, without receiving a lease. The agreement not being in writing, he entered under a verbal lease for five years, or under a verbal agreement for such a lease—and in either case he was only a tenant at will. After going into possession he proceeded to erect the granary and verandah, the defendant furnishing lumber, but before they were completed he delivered the defendant a draft of a written lease, which the defendant took away, but did not sign; so matters went on till a year expired, after which the defendant said he would not sign it; but whether he meant that he would not give a lease for five years, or meant that he

would not sign the one tendered to him by the plaintiff because he did not accede to all its terms as being correct, is left in uncertainty on the evidence. However, after the expiration of a year the plaintiff paid, or settled for a year's rent, and went on and finished the buildings; but whether before or after paying the rent is not clear—probably before, as the first year's rent was settled by a store account contracted with the plaintiff and Lamphiere by the defendant. The plaintiff remained for another year, and paid the rent in cash, and is still in possession; consequently he is a tenant from year to year.

It was argued that the granary and verandah being paid for out of the partnership effects, and the rent for the first year satisfied in the same way, the plaintiff and Lamphiere were joint tenants of the defendant and not the plaintiff alone, and that the work was done by them jointly, and can only be sued for jointly. But I do not adopt that view. The plaintiff's positive statement as a witness, and his conduct in drawing up a lease to himself, and his continuance since he and Lamphiere dissolved partnership, and the defendant's receipt for the first year's rent, all turned to repel the inference, and to shew that the plaintiff was solely the defendant's tenant, and the sole contractor with him in erecting the additions. The fact of the rent and work being satisfied out of the partnership effects, does not establish the contrary; it was a matter to be adjusted between themselves, unless in so far as it might affect the defendant's right to set off the rent had he been sued for the goods sold and delivered, unless so delivered and rendered expressly on account of rent, which is not alleged.

The original agreement was in part performed on both sides while the plaintiff was a tenant at will; on the plaintiff's part by entering and accepting possession, and proceeding to erect the additions; on the defendant's part by delivering possession and furnishing lumber for the granary and verandah. Neither can be placed in *statu quo*. But the agreement having been oral, and the defendant having refused to grant a lease for five years, &c., the question now is, whether the plaintiff can recover

as for work, labour and materials, while he holds possession as tenant from year to year, or whether his remuneration is to be deferred till the term is ended, and then to be allowed the value.

The present yearly tenancy may continue, if both parties are willing, till five, or even more years are ended, and until the value of improvements made might be far less than the original cost.

One way of testing it is to suppose the term ended and the plaintiff out of possession, and upon the defendant's refusal to allow the value, could the plaintiff declare specially as having made such improvements, upon the defendant's special promise to allow the value thereof at the end of the term, stating himself to have been a tenant at first at will, and then from year to year?

Another way is to suppose the buildings all burnt down during the subsisting tenancy: could the plaintiff recover for his improvements upon afterwards delivering the lease and quitting possession?—*Clark v. Serricks, ante*; *Mechelen v. Wallace* (7 A. & E. 49), *Gray v. Hill* (R. & M. 420), *Hoby v. Roebuck and Palmer* (7 Taunt. 157). St. 20, Car. II., ch. 3, sec. 1—All leases by parol, &c., shall have the force of estates at will only, except leases not exceeding three years—Provincial Stat. 12 Vic. ch. 71, sec. 4, passed 30th of May 1849; repealed by 14 & 15 Vic. ch. 7, sec. 4, passed 2nd of August 1851; *Carrington v. Roots* (2 M. & W. 254). The 12th Vic. ch. 71, sec. 4, was in force when the plaintiff entered, and enacted that no lease in writing of any freehold or leasehold land, shall be valid as a lease, “unless the same shall be made by deed;” but any agreement in writing to let such land shall be valid, and take effect as an agreement to execute a lease; and the person who shall be in possession of land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year—*Clayton v. Blacker* (8 T. R. 3), *Pope v. Garland* (4 Y. & C. 394): that a tenant at will at a yearly rent is a tenant from year to year—*Doe Gar v. Colbourn* (Q. B. U. C., February 1842), *Doe ex dem. Rigge v. Bell* (5 T. R. 471): the tenant holds

under the terms of the lease—*Hamerton v. Stead* (3 B. & C. 478, 483, 5 D. & R. 206), in other respects except the duration of the term; and several of the following cases shew that the rule is the same where the party (tenant) enters under an agreement only for a lease, whether such agreement be in writing and valid, or void for want of a written note or memorandum—*Doe ex dem. Peacock v. Raffin* (2 M. & W. 254), *Doe ex dem. Oldershaw v. Breach* (6 Esp. 106), *Doe ex dem. Bloomfield v. Smith* (6 East. 530), *Poole v. Bentley* (12 East. 168), *Digby v. Atkinson* (4 Camp. 275), *Tempest v. Rawling* (13 East. 18), *Torriane et al. v. Young* (8 C. & P. 8), *Doe Warner v. Browne* (8 East. 165), *Lord Bolton v. Tomlin et al.* (5 A. & E. 856), *Doe Thompson v. Amey* (12 A. & E. 476), *Oldersham v. Hall* (12 A. & E. 590), *Doe Nash v. Birch* (1 M. & W. 402), *Doe Westmorland v. Smith* (1 M. & R. 137), *Mann v. Lovejoy* (R. & M. 355), *Hegan v. Johnson* (2 Taunt. 148), *Dunk v. Hunter* (5 B. & A. 322); *Archbold's Landlord and Tenant*, 190-1, ib. 65-6, 104; *Colby v. Stratton* (2 B. & C. 273), *Doe Allan v. Read* (3 B. & Adol. 899), *Hoby v. Roebuck* (7 Taunt. 151, ante), *Souch v. Strawbridge* (2 C. B. 808). The Statute of Frauds said not to apply to an executed consideration (*Coltman, J.*)—*Paul v. Dod et al.* (2 C. B. 800); and see *Carrington v. Roots* (2 M. & W. 294). Now, the only lease that can be recognised in law was a tenancy from year to year: there was such a tenancy—the plaintiff holds on the terms of it; and one of the terms as respects the granary and verandah was, that the plaintiff was to be allowed for the same at the end of the term. The contract is entire, such as it is—*James v. Cotton* (7 Bing. 266, 273), *Waddington v. Oliver* (2 N. R. 61), *Walker v. Dixon* (2 Star. 281), *Oxendale v. Wetherell* (9 B. & C. 386), *Cooke v. Mastine* (1 N. R. 351); also, see *Mayfield v. Wadaley* (3 B. & C. 357, 5 D. & R. 224), *Choter v. Becket* (7 T. R. 201-3), *Cooke v. Tombs* (3 Anst. 420, 5).

On the whole it appears to me the plaintiff erected the buildings as tenant in possession, under an agreement for a lease therefor and as such: that if the granary or verandah

was burnt down during his tenancy he would lose all claim; and that if no accident happened he would only be entitled to be paid when the term should end—whether recoverable as for work, labour and materials, or according to valuation upon a special agreement, is not now material to, or directed on—if not in one form certainly in the other.—*Stone v. Rogers* (2 M. & W. 444-9).

Per Cur.—Rule obtained by defendant made absolute.

Rule obtained by plaintiff discharged. (a)

RYAN V. SALT.

Auction—Sufficiency of contract—Trover for thing sold.

In an action of trover by the plaintiff for a buggy bought by him at auction, he took a non-suit, the judge being of opinion that his case failed on objections taken at the trial. His application in *banc.* to set aside the non-suit, was refused on the grounds that the note or memorandum taken at the time of the sale having been lost, and there being no proof of what it contained, there was not a sufficient note or memorandum within the Statute of Frauds; and that the proof of tender of the price was not sufficient, in that the person to whom it was offered did not appear to be authorised to receive the same.

TROVER for a buggy.

Pleas—Not guilty and not possessed.

The defendant, having been called as a witness for the plaintiff, stated that he owned the buggy: that it cost him 27l. 10s., and had been used eighteen months: that he left

(a) *Note.*—In answer to questions of the plaintiff's counsel on Wednesday 8th of December 1852, the learned Chief Justice remarked that according to the impressions he entertained, the plaintiff was not entitled to recover as a sole plaintiff for the goods sold and delivered, because it was a partnership debt for which both partners should join in suing as plaintiffs for the granary and verandah—not because it was a partnership transaction, but because the period had not yet arrived at which he was to be allowed for the same, according to the terms and understanding upon which they had been erected and made: that the tenancy or term arising by entry, occupation and payment of a yearly rent imported into it all the terms contained in the oral agreement for a lease under which the plaintiff entered, that could be agreed upon and proved orally—under such agreement, which only failed as an agreement for a term of five years for want of a written note or memorandum; and that it appearing that he erected and made the granary and verandah as a part of that which he had undertaken to do as tenant in possession, it became in the nature of the transaction linked with the tenancy or term then and still subsisting, and therefore to be allowed for at the end or expiration thereof. The work was done with a view to compensation in that form, and as work, labour and materials, to be paid for on request; wherefore the law does not imply the promise, &c., by the defendant to pay upon request.

it with Fellows, an auctioneer in Toronto, to sell, if he could get 20*l.* for it : that Fellows told him he had tried it, but could not get that sum for it ; after which, in August last (as the court understood the evidence,) the defendant moved it from Fellows' yard to Huber's yard, where he kept it, and told Fellows it was there, and that if he could get 20*l.* cash for it at any of his sales he might sell it, or if on credit, he might take a note for 22*l.* 10*s.*, payable in six months : that afterwards, and before any sale, he had told Fellows he did not care about selling it, and he need not do it.

It was then proved by a clerk of Fellows that Huber's yard adjoins Fellows', and that Fellows sometimes used it : that in August last, one morning Fellows ordered the buggy to be brought to the stand to be sold, and that at an auction that day it stood in the street with other wagons in front of the auction place : that on that occasion it was sold at auction (Fellows being auctioneer,) to the plaintiff for \$57, or 14*l.* 5*s.*, the terms of sale being cash on delivery.

The auctioneer's clerk stated that he made a memorandum in pencil, of the sale to the plaintiff for \$57, which memorandum he had searched for, but could not find, and believed it was lost : that it was a fair sale : that the plaintiff said it was too late that day for the bank, but that he would come next morning and pay a check for it, or the money.

The defendant stated that (apparently) next morning, and long after he had spoken to him to sell, and after he had told him he did not care to sell, Fellows called upon him and said he had offered the buggy for sale, and had sold it if the defendant liked the price ; or that he had sold if the defendant choose to take the price ; and that he might go to the Western Hotel and see the plaintiff and get the price of it ; or if he did not chose to take the price, to call at the Western Hotel and say so : that he at once called at the Western, but did not find the plaintiff there, he being out : that he called a second time, and was told he had left town, and (he) the defendant then went and took the buggy away, as he would not take that price.

The auctioneer's clerk stated that the next morning the

plaintiff offered the money to him, but that he could not deliver the buggy to him, because it had been removed, and was not in the yard. The money was not apparently paid to, or received by the clerk.

On this evidence the defendant's counsel moved a non-suit, on the grounds—

1st. That no note or memorandum in writing of the bargain was proved, nor any part payment, nor any delivery, so as to take it out of the Statute of Frauds.

2nd. That the plaintiff did not shew a right of property and possession.

3rd. That no sufficient authority was shewn in the auctioneer to sell; and that the original authority had been countermanded.

4th. That, admitting authority to sell, it was only a conditional sale, if the defendant agreed to it, and that he dissented.

The plaintiff then took a non-suit, the learned judge being of opinion that the case failed.

In the early part of last term *Hallinan*, for the plaintiff, moved for a rule to set aside such non-suit; the evidence, as he contended, being sufficient to entitle him to recover. He also filed the affidavit of Fellows, who was not examined as a witness at the trial—denying the alleged revocation of his authority to sell—affirming the sale as absolute, and denying that he represented it to the defendant as conditional. The reason of his absence at the trial was not explained, though *Mr. Hallinan* said it was because he was serving as a juror in the Division Court.

MACAULAY, C. J.—The case presents the following questions :—

1st. Whether the auctioneer had authority to sell so as to bind the defendant.

2nd. Whether there was a sufficient note or memorandum of the bargain within the Statute of Frauds.

3rd. Whether the tender of the money to the clerk was a sufficient tender.

4th. Whether trover lies under the circumstances in evidence.

5th. Whether the affidavit entitles the plaintiff to relief from the non-suit.

1st. The cases *Gunn v. Gillespie* (8 U. C. R. 151), *Pickeron v. Bush* (15 East. 38), *Dyer et al. v. Pearson et al.* (3 B. & C. 38), *Williams v. Millington* (1 H. B. 84), and *Morton's Vendors*, 295-6, 153; *Ross' Vendors*, 308-9, shew that it was properly a question for the jury upon the evidence, whether the defendant had not clothed the auctioneer with authority to sell, having once placed the buggy in his hands for that purpose, and not afterwards effectually removed it.

Possession of goods by a known auctioneer is *prima facie* evidence of authority to sell them at public auction; and if *bona fide* sold and purchased, it is sufficient to bind the owner. At all events, it forms a question for the jury whether the owner had by his conduct enabled the auctioneer to hold himself out to the public as intrusted with the goods, to sell under circumstances binding upon him.

2nd. By the 17th sec. of the Statute of Frauds, 29 Car. II. ch. 3, no contract for the sale of goods for the price of 10*l.* sterling, or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised &c.—See further, provincial statute 13 & 14 Vic. ch. 61, sec. 7.

The case of *Clarkson and Brunskill v. Noble* (2 U. C. R. 361), decided that an auctioneer's clerk assisting at a sale presided over by the auctioneer is sufficiently the agent of both parties to bind the owner and vendee of goods by a written entry of the sale, if it contains all that the statute renders indispensable; and see the following authorities: *Morton's Vendors*, 295-7, 163; *Bird v. Boulton* (4 B. & Adol. 443, 1 N. & M. 313), *Farebrother v. Simmons* (5 B. & A. 333), *Kucklin v. Wilson* (4 N. & A. 446-7). As to the sufficiency of the note or memorandum in point of contents—*Simon v. Motivos* (3 Bur. 1921), *Champion et al. v. Plummer* (1 N. R. 252), *Gerton v. Matthews* (6 East. 507),

Cooper v. Smith (15 East. 103), Elmore v. Kingscote (5 B. & C. 583), Grant v. Fletcher (Ib. 436), Goom v. Aflalo (6 B. & C. 117), Phillimore v. Barry et al. (1 Comp. 513), Kinworthy v. Schofield (2 B. & C. 945, 4 D. & R. 556), Emmerson v. Heelis (2 Taunt. 38), White v. Proctor (4 Taunt. 290), Henderson v. Barnewall (1 Y. & J. 387-9), Taylor Ev. 690-1, 685, 736; Laythroep v. Bryant (2 N. S. 742), Heyman v. Neale (2 Camp. 339, 403), Gosbell v. Archer (2 A. & E. 500), Coles v. Trecothick (9 Ves. 243), Sivenright v. Archibald (15 Jurist 947, 6 Am. Eng. 286).

It may be asked at whose risk was the buggy during the night after the sale—See Payne v. Brander (2 Star. 568), Syeds v. Hay (4 T. R. 260.)

Now, although a memorandum written in pencil will no doubt suffice—there is no distinct proof of what was written—the only evidence is that the clerk of the auctioneer made a memorandum of the sale to the plaintiff for \$57; but whether it contained the name of the owner, or sufficiently expressed the name of the seller and buyer, article sold, and price, or how signed, does not appear; and the entry does not seem to have been made in the sale-book, or in any regular record of the sales, but only a loose memorandum, so carelessly kept that it has been lost or mislaid so that it cannot be found; I do not therefore think there was proof sufficient of a note or memorandum in writing of the bargain according to the statute, and without it the property in the buggy would not pass to the plaintiff, and if it did not, he could not maintain trover therefor as being his property—Ross' Vendors, 1, 2.

3rd. To entitle the vendee of goods payable for on delivery to receive possession of the same, payment or tender of the price must be made to some one authorised to receive it. Now the tender was made to the auctioneer's clerk—it may be supposed at the place of business of the auctioneer; but previous to that the owner had repudiated the sale, and refused to be bound by it, and, so far as he well could, had revoked any authority the auctioneer or his clerk might otherwise have had to receive the money, and he had removed the buggy. In short, the clerk declined

receiving it owing to his inability to deliver the buggy, evincing his want of continued authority. Whether the plaintiff had before such tender heard of the defendant's dissent to the sale, does not clearly appear: if he had, the tender to the clerk afterwards would be purely one to an unauthorised agent—*Donnison v. Elsley et al.* (McClell 25), *Stokes v. Carne et al.* (2 Camp. 339), *Warwick v. Slade* (3 Camp. 127), *Goodland v. Bleewith* (1 Camp. 447-8), *Morton's Vendors*, 277; *Ross' Vendors*, 84, note; *Cassel v. Thornton* (3 C. & P. 352), *Sykes v. Giles* (5 M. & W. 645), *Moffatt v. Parsons* (5 Taunt. 307), *Kirton v. Braithwaite* (1 M. & W. 310), *Barrett v. Deere* (M. & M. 200), *Wilmot v. Smith et al.* (Ib. 239, 5 C. & P. 453), *Watson v. Hetherington* (1 C. & K. 36).

The proof seems to have been deficient therefore, both in respect to the sufficiency of a memorandum or note in writing to pass the property to the plaintiff, and in the tender of the price to entitle him to the possession thereof; and without establishing both, the action of trover is not maintainable.

4th. If the sale was shewn to have been complete by proof of a sufficient memorandum in writing, and a *bona fide* tender of the price to a person legally authorised to receive payment and acquit the vendee, there seems no reasonable ground to doubt the plaintiff's right to maintain trover, as having acquired a right of property by the contract of sale, followed by a right to the possession upon tender of the price—*Ross' Vendors*, 368, 2nd Ed.; *Morton's Vendors*, 310, 318; *Holderness et al. v. Shackles* (8 B. & C. 612), *Bloxam et al. v. Saunders et al.* (4 B. & C. 948), *Tarling v. Baxter* (6 B. & C. 364), *Milgate v. Kebble* (3 M. & S. 100).

A new trial could only be granted upon payment of costs; and considering the object of the action, which is merely to recover the difference between the value of the buggy and what plaintiff was to have given for it—in other words, the difference between \$57 (14*l.* 5*s.*), and 20*l.*, viz., 5*l.* 15*s.*—it is not usual to set aside verdicts or non-suits in such cases.

The plaintiff may of course bring another action; but

if he cannot prove a sufficient memorandum in writing, followed by a sufficient legal tender to one duly authorised to receive payment, it would hardly seem advisable.

McLEAN, J., not in court, from sickness. SULLIVAN, J., concurred.

Rule discharged.

MANNING V. ROSSIN ET AL.

Malicious arrest—Two counts, one defective—General verdict.

Case for malicious arrest. The declaration contained two counts: 1. Alleging that the defendant, not having &c., made a false and malicious affidavit, &c. 2. Want of probable cause, &c.: *not alleging the suit to be at an end, or showing how it ended, if at an end.* Plaintiff obtained a general verdict on both counts for 6*l.* On motion by defendants to arrest judgment, or for a new trial: *Held*, 2nd count bad for the above omission, and that such omission was not cured by verdict; but that it is no longer the course to arrest judgment where one of several counts is bad, but to order a *venire de novo*, which was accordingly done in this case.

Semble: Where there are several counts, one of which is defective, and a general verdict is rendered, an application to restrict the verdict to the good counts should be made to the judge who tried the cause, when it depends on the application of the evidence to the different counts.

Case for malicious arrest. Writ issued 6th of September 1852. Declaration dated 16th of September 1852.

1st count.—That the defendants on the 14th of August 1852, not having any reasonable or probable cause for believing, and not believing, that the plaintiff was about to leave Upper Canada, but contriving, &c., in pursuance of a certain false and malicious affidavit made by the defendant Marcus Rossin, duly made before a commissioner, &c., the defendants maliciously issued a writ of *ca. re.* to the sheriff of York, &c., for the arrest of the plaintiff in *assumpsit*, and to be indorsed for bail for 11*l.* 1*s.* 3*d.*; and while in force, to wit, on the 14th of August 1852, not having then any reasonable or probable cause as aforesaid, maliciously caused the plaintiff to be arrested under said writ, and detained in custody, &c.: by means whereof, &c.

2nd count.—For maliciously arresting the plaintiff under a *ca. re.* to the same sheriff, not having any reasonable or probable cause of action against him for the sum indorsed, 11*l.* 1*s.* 3*d.*; but not alleging the suit to be at an end, or shewing how it ended, if at an end.

Plea—Not guilty.

At the trial, before Mr. Justice Burns, at the last 'Toronto Assizes, the plaintiff proved the usual affidavit of debt, made in the Queen's Bench by Marcus Rossin, one of the defendants—that the plaintiff was indebted to the defendants in 56*l.* 10*s.* 7*d.*, principal upon a promissory note made by the plaintiff to the order of one Mr. Moses, at a day past, and by him indorsed to the defendants; and also in 56*l.* 10*s.* 3*d.* upon another similar note; and that he had good reason to believe, and verily did believe, that the plaintiff was immediately about to leave Upper Canada, with the intent and design to defraud the defendants of their said debt.—Sworn the 14th of August 1852, before Leith, a commissioner, &c.

The plaintiff then proved that he was arrested on the 14th of August last, at Yorkville, whence he was brought to Toronto, and gave bail after lying in custody two or three hours: that one of the defendants hired a cab and sent the bailiff out after him, expressing his apprehension that the plaintiff would go away. The day was Saturday. That the plaintiff had been in Toronto six years in business, principally as agent in insurance business, at a salary of 400*l.* a year. The plaintiff denied ever having said to any one that he had any idea of leaving the country: that in February last he was negotiating with an insurance company to go to Detroit, but only on business, not to reside, but did not go: that he engaged in the insurance business throughout the province; had built a house here, wherein his family lived, and which he had offered for sale in the spring because he thought of going to Detroit. That after the arrest he saw Samuel Rossin and told him it was a high-handed measure to arrest him, to which he replied that the plaintiff was going away to Australia, and must stand to the consequences.

Several witnesses were called by the plaintiff, who spoke of their knowledge of the plaintiff, and expressed their good opinion of him, and that they did not suspect him of any intention to leave the province, nor had they heard any such report. They spoke more or less strongly according to their knowledge of him; and one of them said that if he

owed him 100*l.* and heard he was going to Australia he would have arrested him.

A non-suit was moved, but refused.

On the defence the defendant Marcus Rossin, who made the affidavit of debt, was sworn, and said Moses came to their place and told him he had been informed the plaintiff had said that if he had the money he would go to Australia : that he then made inquiries of people likely to give him information : that he spoke to Mr. Wilson, who said he had heard the plaintiff was going to leave the country, and that one Beekman was going also, and he did not know which would go first (a): that he then went to Mr. John Duggan to consult him, and spoke to one McLean after the arrest, who said he had been told the plaintiff was going away—all the inquiries being on the same day the affidavit was made. On cross-examination, he said the defendants had transactions with Moses (the payee of the note), and that the notes had been indorsed over to them last winter in security for money lent to Moses.

Mr. Wilson corroborated the defendant so far as respected the information derived from him respecting the plaintiff.

Mr. Duggan, the defendants' attorney, said the defendant Marcus Rossin consulted him, and he advised him as to what it was necessary to swear; and that he believed the defendant acted *bona fide*, so far as he could judge. A clerk of the defendants stated that Moses and Mr. Duggan were together in his presence, when Moses being asked if the plaintiff was going away, said he had recently lost his insurance agency, and did not know what would keep him here. The plaintiff had stated as his own witness that he was formerly agent for two insurance companies, one of which failed and the other discontinued business, and was only appointed to a third a month before the trial. Mr. Duggan said the interview was at his suggestion on purpose to hear what Moses would state; but he is not noticed as having related Moses' answers, or corroborated the clerk in his account of them.

(a) Beekman was said to be one of the indorsers of the promissory notes, and to have gone to Australia a month after the arrest.

Another witness (McLean) said that in conversation last spring the plaintiff said he wished to sell his cottage and settle at Detroit; and that since that he wanted to sell. Another said he was unacquainted with the plaintiff, but had heard from one Armitage before the month of August last that he was going to leave the town. Another said that before August last one Gordon had told him the plaintiff was anxious to sell his cottage and go to the United States. The latter evidence was received though not acted upon or known to the defendants before the arrest, to contrast with what the plaintiff's witnesses said as to the improbability of his intending to depart. The learned judge left the case to the jury, telling them the affidavit was *prima facie* to be assumed to be true, and that it depended upon whether there was the absence of probable cause; for if there was malice that was to be inferred, and that the onus of shewing the want of probable cause was on the plaintiff, and had been attempted: that on the other hand, the defendant Marcus Rossin shewed upon what he acted; and that if in truth he had received such information and acted upon it *bona fide*, if he was told by Moses and Wilson what they said he had been told, and acted *bona fide* on that information and upon Mr. Duggan's advice, they should find for the defendants; but that, if he had the information and still did not act *bona fide* upon it—that is, did not believe it (a)—to find for the plaintiff: that the test was, whether the information received was in itself reasonably calculated to excite the apprehension sworn to, and did the defendants believe it—not whether it was true—meaning the plaintiff's alleged intended departure.

The jury found for the plaintiff 5*l.* damages.

Nothing was said of the action being against two defendants jointly.

In the following term *John Duggan*, counsel for the defendants, obtained a rule upon the plaintiff to shew cause why judgment should not be arrested, the verdict being entered generally on the whole record, and the second count

(a) See *Haddrick v. Heslop & Raine*, 12 Q. B. 267; *Turner v. Ambler*, 10 Q. B. 252; *Broad v. Ham*, 5 Bing. N. C. 722, 8 Scott, 40.

not shewing the action to be concluded, discontinued or ended; or that the demands of the defendants were not due, and not setting forth any sufficient cause of action against either of the defendants; or why the verdict should not be set aside and a new trial had between the parties as being contrary to law, evidence, and the judge's charge.

[The learned judge has intimated to us that he would have been better satisfied with a verdict for the defendants, but was not prepared to recommend the court to disturb it.]

Halkinan shewed cause, and contended there was evidence of the want of reasonable or probable cause to support the first count to which he now elected to restrict the verdict, thinking no evidence applicable to the second, and only one cause of action established, and that relating to the first count—*Baldwin v. Henderson*, 4 U. C. R. 361; *Eddowes et al. v. Hopkins et al.*, 1 Dow. 372-8; *Williams v. Bredon*, 1 B. & P. 329.—That it was not against law, evidence, or the judge's charge: that there was reason to suspect collusion in the transfer of the notes by Moses, and his information against the plaintiff, the notes being indorsed and delivered to the defendant in security only, in the first instance, but finally or ostensibly transferred shortly before the arrest, followed by alleged information from Moses, calculated to alarm the defendant, but only to make evidence, and not honestly believed or acted upon: that the jury were not satisfied the defendant was really in earnest, and were warranted in that distrust.

Duggan, in reply, submitted that the verdict could not now be shifted or restricted by the court to frustrate this rule: that the plaintiff's counsel opened the case as upon both counts, though he could not support the second in evidence: that he cross-examined the defendant Marcus Rossin with a view to shew nothing due, but failed: that the evidence of want of probable cause, if sufficient to call for a defence, was repelled by evidence ample to shew such cause to have existed: that if the verdict is to be disturbed it is a ground for a new trial; and that the plaintiff's evidence was too slight to call for any indulgence to the prejudice of the defendants, who were hardly dealt with

by the jury.—*Day v. Robertson*, 1 A. & E. 158; 1 Saund. 228.

MACAULAY, C. J.—The only rule before us is to arrest the judgment or for a new trial. There is no rule to amend the verdict by restricting it to the first count; nor has the learned judge who tried the cause been applied to, that we are aware of, to make such amendment by his notes, which seems the more regular course where it depends upon the application of the evidence to the different counts—for the evidence is not strictly before this court. When the court can see upon inspection of the *Nisi Prius* record that the amendment may be properly made without reference to the notes of evidence, it may be obtained by rule.—*Lee v. Muggeridge et al.* (5 Taunt. 42), *Harrison v. King* (1 B. & A. 161-3), *Beasley q. t. v. Cahill* (2 U. C. R. 320), *Henley v. The Mayor and Corporation of Lyme Regis* (6 Bing. 100), *Martin v. Coleman* (1 H. & W. 86), *Ernest v. Brown* (4 Bing. N. S. 162), *Sandford v. Alcock* (12 L. J. Ex. 40, 10 M. & W. 689), *Bull v. Neele* (1 Chitty. R. 623), *Ferguson et al. v. Clarke* (2 Star. N. P. C. 442), *Mellish v. Richardson* (7 B. & C. 819, 3 Bing. 334), *Morley v. Reid* (10 Jur. 18), 2 Archbold Prac. 126-7. That the verdict may be amended there is no doubt: the case cited of *Baldwin v. Henderson* shews that. Then, as to the validity of the second count: before the new rules the want of an averment that the suit was at an end was held to be cured by the verdict, as being an indispensable part of the plaintiff's proof to enable him to recover a verdict—*Skinner v. Gunter* (1 Saund. 228), *Stennet v. Hogg* (Ib. 228 *a*, note *f*); and since the new rules there has been no question made upon the point—*Whitworth v. Hill* (2 B. & Ad. 695), *Mellor v. Baddeley et al.* (4 Tyr. 962), *Drummond v. Pigou* (2 Scott 228), *Watkins v. Lee* (5 M. & W. 271). But, since it is directed that the plea of not guilty does not now, as formerly, put in issue the determination of the suit, it cannot, after verdict, be intended to have been proved at the trial, and cannot any longer be cured by verdict. Being, however, a material and essential statement of fact, and entirely omitted, the count seems to me clearly bad, even in arrest

of judgment. If the plaintiff could not have been required to prove, we cannot intend that he proved it; and, consistently with all that is alleged, the defendants may have recovered or may hereafter recover the full amount of the sum sworn. They may have obtained, or may hereafter obtain judgment, and lead to the inconsistency of a recovery by the plaintiff for a malicious arrest, because nothing was due, whereas it may be that all was due, and the defendants obtain judgment accordingly. I certainly think the second count bad. But it is no longer the course to arrest judgment where one of several counts is bad, but to order a *venire de novo*.

If the amendment be granted, then we are asked to grant a new trial on the evidence.

The evidence to shew that the defendant had reason to believe &c., was (according to his own account) what Moses had voluntarily stated, and what Mr. Wilson said upon being asked the question.

Strictly, I think there was evidence of the want of reasonable and probable cause, especially against the defendant Marcus Rossin, who made the affidavit of debt, sufficient to call upon the defendants to prove what reason they had. Then, on the other hand, however suspicious the evidence of Moses' conduct might have been had it stood alone, I think there was evidence from others whose veracity there was no apparent reason for doubting—such as Mr. Wilson—that went strongly to establish reasonable cause, and in proportion to repel the allegation of want of reasonable and probable cause. Of course, consistently with this the jury might have believed they had not acted *bona fide* on the information received; but Mr. Duggan's evidence goes far to repel such inference, and it is not to be desired that while the law of arrest continues creditors should, on the one hand, be deterred from availing themselves of it on reasonable grounds, or be encouraged to enforce it heedlessly or inconsiderately, much less wantonly or maliciously, on the other. Reluctant as we should be to allow the verdict to stand on this evidence, especially when the very amount of it evinces that the jury had no very deep impression

of the wanton and malicious conduct imputed to the defendants; still, as a new trial could only be granted on payment of costs if the plaintiff was otherwise entitled to judgment, we could hardly feel justified in granting relief against so small a sum on those terms, although the effect of the verdict upon the character of the parties was another consideration entitled to great weight.

Upon looking into the cases and seeing that where one count is good and the other bad, and the verdict for damages general, it is not now the course to arrest judgment, but to award a *venire de novo*, and thinking it desirable that the case should undergo another investigation, we deem it the more advisable course to modify the present rule and award a *venire de novo*.

As to evidence of reasonable cause, see *Drummond v. Pigou* (2 Bing. N. S. 114), *Smith v. Thomas* (2 Ib. 372), *Delegal v. Highley* (Ib. 950). As to a *venire de novo*, see *Eddowes et al. v. Hopkins et al.* (1 Doug. 377), *Leach v. Thomas* (2 M. & W. 427), *Corner v. Shaw*, and *Agrey et al. v. Fearnside et al.* (4 M. & W. 163, 168), *Lewin v. Edwards* (9 M. & W. 720), *Emblin v. Dartnell* (12 M. & W. 830), *Gould et al. v. Oliver* (2 M. & G. 208, 238).

McLEAN, J., and SULLIVAN, J., concurred.

Venire de novo awarded.

NOTE.—On Wednesday the 7th of December 1852, after the above judgment had been delivered, Mr. Hallinan rose and said no cross rule was moved in *Baldwin v. Henderson*, when the Chief Justice remarked there was a cross rule in *Beaseley v. Cahill*, but that he had not looked at the other case upon this point, and his impression was that there had been a rule: that he had looked at it upon the main question whether the verdict could be amended and restricted to the first count or not, but not with a view to the practice: that, on looking at the case, 4 U. C. R. 361, it appears as if the amendment was ordered by the court in *banc*, and without any cross rule being moved on terms at the argument upon the return of the rule to arrest judgment: that, upon again looking through the cases, it does not seem very clearly settled whether the application must be made to the judge who tried the cause, or may be made to the court in *banc*, nor whether a rule to shew cause is necessary or not: that instances are to be found where such course has been adopted—namely, application to the judge and to the court, and upon the rule nisi and without it. He further remarked that the more regular practice seems to be to apply to the judge who tried the cause whenever it depends upon his notes of the evidence; or a rule nisi, if the application is to the court with a reference to the judge's notes. See *Eddowes v. Hopkins*, 1 Dow. 376; *Williams v. Breeden*, 1 B. & P. 329; *Spencer v. Goter*, 1 H. B. 78; *Mellish v. Richardson*, 7 B. & C. 819; *Henley v. The Mayor of Lyme Regis*, 6 Bing. 100, 8 M. & P. 310; *Holt v. Scholefield*, 6 T. R. 694-5; *Wallace v. Goddard*, 2 M. & G. 912; *Beaseley v. Cahill*, 2 U. C. R. 320; 1 Chitty R. 625, note.

HAWKE V. SALT ET AL.

Action on promissory note—Pleading.

Where in an action by an indorsee, the holder of a promissory note, against the maker and the indorsers, under the provincial statutes, the defences clash, or the facts set up as a defence are not equally adapted as a defence to all the parties, they should plead separately. Therefore, a plea by all the defendants that there was no consideration for the making of the note, nor for the respective indorsements, nor either of them, and that plaintiff holds the note without any consideration or value, is bad.

Assumpsit on a promissory note.

Declaration avers that defendant Salt made the note, &c., and thereby promised to pay, &c., to defendant Robert Maitland or order; and that he afterwards indorsed the said note to the defendant John Davis, who afterwards indorsed to the plaintiff. Breach—Non-payment by Salt, and due notice thereof to defendants Maitland and Davis. By reason whereof said defendants became jointly and severally liable to pay, &c.

Pleas, by all the defendants—1st. That Salt did not make the note. 2nd. That Maitland and Davis did not, nor did either of them indorse. 3rd. "That the said John Salt made the said note for the accommodation of the said Robert Maitland, and that there never was any value or consideration for the making of the same: and the defendants further say, that there was not any value or consideration for the indorsement of the said note by the said Robert Maitland to the said John Davis, or for the indorsement thereof by the said John Davis to the plaintiff; and that the plaintiff always held, and now holds the same, without any value or consideration; and this the defendants are ready to verify, &c."

Issue taken on 1st and 2nd pleas. Demurrer to 3rd plea, for the following causes:—That the said plea is double and multifarious, in this—that it is stated therein that the said note was made by the said John Salt for the accommodation of the said Robert Maitland, and that there never was any value or consideration for the making of the same, and that there never was any value or consideration for the indorsement of the said note by said Maitland to said Davis, and by him to the plaintiff: and for that the said plea does

not deny that the plaintiff gave a *bona fide* or valuable consideration for said note to any person or persons, and now holds the same without any value or consideration: and that the said plea is no answer to the said declaration, and shews no new facts to defeat the *prima facie* case in said declaration set forth."

Joinder in demurrer.

Dempsey, for the demurrer, contended that the plea was double—*Miller v. Ferrier*, 7 U. C. R. 540; *Bank of North America v. Sherwood*, 6 U. C. R. 213; *King v. Phillips*, 12 M. & W. 705; *Allen v. Skaed*, 9 U. C. R. 217; and see *Heyden v. Thompson*, 1 A. & E. 210, at end of the case.

Weller, in reply, submitted, that, though separately liable, the defendants, being all sued together under the provincial statute, might either join or sever in pleading: that no objection had been made to their joining in this plea: and that, however objectionable the plea of *non fecit* might have been had it been demurred to, the matter contained in the present pleas might have been pleaded by the defendants separately, and would have been a good defence for each, and is therefore good for all: that it was not double, but relied upon the want of consideration, not only as between the maker and first indorsee—which would not do of itself—but also as between the payee and his indorsee, and each indorsee in succession, shewing that the note passed to plaintiff without consideration in relation to any of the parties thereto or holders thereof—which was a good defence: that anything less would have rendered the plea bad; and that no more is stated than is essential to a valid defence, by shewing the making and a series of successive transfers, all without consideration.

MACAULAY, C. J.—This action is brought under the statutes 5 Wm. IV., ch. 1; 3 Vic., ch. 8; and 13 & 14 Vic. ch. 59.

The statute 5 Wm. IV., ch. 1, sec. 5, enacted, that in any such action judgment might be rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the res-

pective parties should appear, either upon confession, default, by *pleading*, or on trial. The first consideration is, whether, if the defendants plead jointly matter which amounts to a good defence as to some, but not as to others, the plea upon demurrer if bad in part is bad in toto, or whether the defence of each party is to be disposed of severally, irrespective of the other defendants, according as the rights and liabilities of the parties respectively may appear in such plea—contrary to the ordinary rule on that head.

If such a joint plea were put in issue by a replication traversing the whole, I doubt not the liability of each defendant must be disposed of separately according to the evidence.

The question here is, whether a like course must be taken upon demurrer.

The old doctrine of a demurrer being too large seems to be exploded, and judgment thereon may now be given distributively—1 Saund. 295; Price v. Williams (1 M. & W. 6), Briscoe v. Hill (10 M. & W. 735), Hinde v. Gray (1 M. & G. 201, note), Slade v. Hawley (13 M. & W. 761), Vivian v. Jenkins (3 A. & E. 741), Monkman v. Stephenson (11 A. & E. 412, note). But this alteration does not seem to have subverted the old rule that a plea bad in part, or bad as to one of several defendants, was bad in toto as to all—Stephens' Pleading, 448, and note (x); 1 Saund. 28, notes; Hartley and another v. Manton (5 Q. B. 247), Christopherson v. Bore (11 Q. B. 473).

There is a case of Small v. Rogers, decided in the Queen's Bench U. C. Mich. Term 6 Vic., Rob. & Har. Dig. 94, in which, to a declaration against several separate parties to a promissory note under our statute, the defendants jointly demurred, because it did not aver notice to the indorser; and, though it was objected that the demurrer was too large, being jointly by all the defendants, and the declaration good as to some, the court gave judgment distributively for the plaintiff, against the maker, and for the indorsers. That was a case of a joint demurrer to a declaration. But it does not thence follow that several defendants may join

in pleading a series of facts, or traversing a series of allegations, some portions of which would constitute a good defence to some of the defendants, and other portions to others; and, though we have hesitated in adopting that view, we think it better to adhere to the settled rule established by the English authorities, in order to avoid the multiplicity of statements, and the confusion and perplexities likely to arise by allowing several defendants, defending under separate interests or distinct facts, joining together in one plea.

If the defendants can unite in a plea that offers an equally good defence or answer to each and all of them, I see no reason why they may not join: but if the facts to be relied upon vary, then it appears the more regular and consistent course for them to plead separately, as doubtless they may do.

If, then, the present plea is bad in part, or as to one or more of the defendants, it is bad as to all; though it might have amounted to a good plea if pleaded by one alone.

1st. As to Salt (the maker), the plea, if pleaded by him alone, would have been good. He was bound to shew the absence of consideration between himself and the plaintiff, and all the intermediate parties. This the plea alleges. If he failed as to any, or if the plaintiff could shew valuable consideration as to any, the plaintiff would be entitled to recover. There is a form adapted to such a case in Chitty Junr. Forms, p. 262, 1st ed.: also a form of replication alleging value. The form of plea there given alleges the acceptance of the bill to have been for the accommodation of the drawer, and without consideration; but it does not state how or why it was that it was indorsed over to the plaintiff without consideration; it merely alleges the want of consideration, as is done in the present case, and omits to state how the indorsement was without consideration. But no objection, if objectionable, is made thereto in this demurrer.—Atkinson v. Davies (11 M. & W. 241).

The cases of *Gilmore v. Edmunds* (2 U. C. R. 419), *Brown et al. v. Wheeler* (6 U. C. R. 353), *Allan v. Skaed*

(9 U. C. R. 217) if well decided, (*Bingham v. Stanley*, 2 Q. B. 117), are not against the plea as pleaded by Salt only. Those were cases of demurrer to replications traversing the pleas. The plea in the last case is just like the present, restricted to the maker (Salt), and was not excepted to: the demurrer was to the replication.

2ndly. Then, as to the two indorsers (Maitland and Davis), the plea is bad as to each of them, taken separately. It was only necessary for Maitland to shew the absence of consideration as between him and Davis, and Davis and the plaintiff, and for Davis to shew its absence as between himself and the plaintiff. It was unnecessary for either to deny consideration between Salt (the maker) and Maitland (the payee); nor as against the indorsers would it be of any avail to the plaintiff to prove it; and the want of it would be no defence to them. The plea therefore, as respects them, seeks to bring in issue the want of consideration between parties as to whom it was immaterial whether there was consideration or not. It may be said, that, so far as immaterial, the averments may be rejected as surplusage; and that the plaintiff should move to strike them out as redundancies: but the answer is, that they were material to be alleged by one of the defendants (Salt), and that more was required to be stated by Maitland (the first indorser) than by Davis (the last). And it appears to me that, as to them, it is loading the plea with multifarious matter calculated to embarrass the plaintiff in taking issue, and upon the trial thereof, and therefore a sufficient ground of formal exception upon special demurrer, although it is said that surplusage will not vitiate—*Stephens' Pleading* 468-9. It is not surplusage in the sense there intended: and I think the objection is virtually embraced in the first ground of demurrer assigned, though not very distinctly—*Wolfe v. Bevan* (13 M. & W. 164), *Smith v. Clench* (2 Q. B. R. 835).

It is a good ground of demurrer that a plea traverses immaterial matter—*Stephens' Pleading*, 275, 469, 282. And had the plaintiff here taken issue upon that which is immaterial as to the indorser, though material as to the

maker, he could only have succeeded eventually against the latter; as to the former, the issue would be immaterial. I mean, had he taken issue upon that part of the plea only which denies consideration as between Salt and Maitland—which would be a sufficient replication as to Salt, but not as to either of the other defendants—Salt was bound to shew the want of consideration from first to last; and if he could not establish the want of it as between himself and Maitland he would fail, although there might have been no consideration for the indorsements.

It would be quite immaterial as to the indorsers, who were not required to shew want of consideration as to any of the parties antecedent to themselves respectively. Had they merely pleaded such immaterial matter in separate pleas, the pleas would have been clearly bad, and open to demurrer; and I do not see that such irrelevant matter being joined with other separate and distinct matter that is material would obviate the objection. If the plea be read as by each defendant separately, or successively, the redundancy as to the indorsers will clearly appear.

As to the objection that the plea does not deny that the plaintiff gave value to any one—which he might have done had the note been discounted by subsequent holders, and afterwards been retired and paid by the plaintiff instead of Salt (the maker)—in which event, according to *Brown v. Baldwin*, in the Queen's Bench, U. C. Hil. Term, 7 Wm. IV., he would have recourse against the prior parties though they became successively parties for the accommodation of Salt. I think it properly forms matter of replication, if it could be replied. The plaintiff declares as indorsee of Davis, and the plea alleges that he so holds without consideration.

If otherwise, it should be replied.

The case of *Miller v. Ferrier* (7 U. C. R. 540), cited by Mr. Dempsey, much resembles the present; but is not quite like it, as will be seen by comparing the two pleas. In that case too the plea was pleaded by a single defendant. My judgment in that case is not printed in the report, but I will read it on this occasion, and hand it to the reporter, to be

added in a note to the present case. (a) The result of our opinion is, that where the defences clash, or the facts are not equally adapted as a defence to all parties, they should plead separately.

Per Cur.—Judgment for demurrer.

(a) The following is the judgment referred to by the Chief Justice:

MILLER V. FERRIER.

Plaintiff declares as indorsee of defendant, who was payee of Thomas Brooks.

3rd Plea—That defendant indorsed the said note for and by way of accommodation of said Brooks, and without having received any consideration or value for such indorsement: and that the said note was indorsed to plaintiff, as in the declaration mentioned, without any value or consideration given by him for such indorsement.

Demurrer—That it is not stated at whose request defendant indorsed the note—not stated that Brooks did *not at any time* give consideration; or that defendant never received any consideration.

MACAULAY, J.—The plaintiff declares as indorsee of the defendant, who is payee of Brooks (the maker of the note); and the plea, not denying, but admitting that the note was indorsed to the plaintiff, as in the declaration mentioned, alleges that it was so indorsed—*i. e.*, by the defendant to the plaintiff, without any valuable consideration given by him for such indorsement—without shewing how without consideration, otherwise than by previously alleging, by way of inducement, that he (the defendant) indorsed it for and by way of accommodation for Brooks (the maker); which, so far from supporting the allegation that it was indorsed to the plaintiff without any value or consideration given by him therefor, implies the contrary, and that he did give consideration—not to the defendant directly but to Brooks, for whose accommodation the defendant indorsed it to the plaintiff. The defendant does not say the plaintiff did not give any consideration to Brooks. It is consistent with the plea, that although the defendant indorsed the note to the plaintiff without value or consideration given by the plaintiff for such indorsement, yet that being so indorsed for the accommodation of Brooks, as the plea asserts, he delivered it so indorsed to the plaintiff for value. It does not allege that the plaintiff received and holds the note without any consideration given by him to anybody. If originally indorsed by the defendant in blank for the accommodation of Brooks, it might have passed through many hands, each successive holder giving full value, before it came to the plaintiff's possession; and, under such circumstances, though he gave no value for it, the want of value as between him and the person from whom he received it would be no defence. This, however, does not appear to have taken place, and is but matter of supposition to illustrate the insufficiency of the plea. The plea does not shew how the note was indorsed to the plaintiff, as in the declaration mentioned (*i. e.*, by the defendant), without any value or consideration, except argumentatively, by the allegation that the defendant indorsed it for the accommodation of the maker, which does not shew the absence of value or consideration as between the plaintiff and Brooks. The averment "without any consideration *given by him*" imports given by the plaintiff to the defendant; and, had the plea so distinctly declared, it would have been clearly bad—*Low v. Chifney* (1 Bing. N. S. 267), *Bank of Upper Canada v. Sherwood* (8 U. C. R. 116).

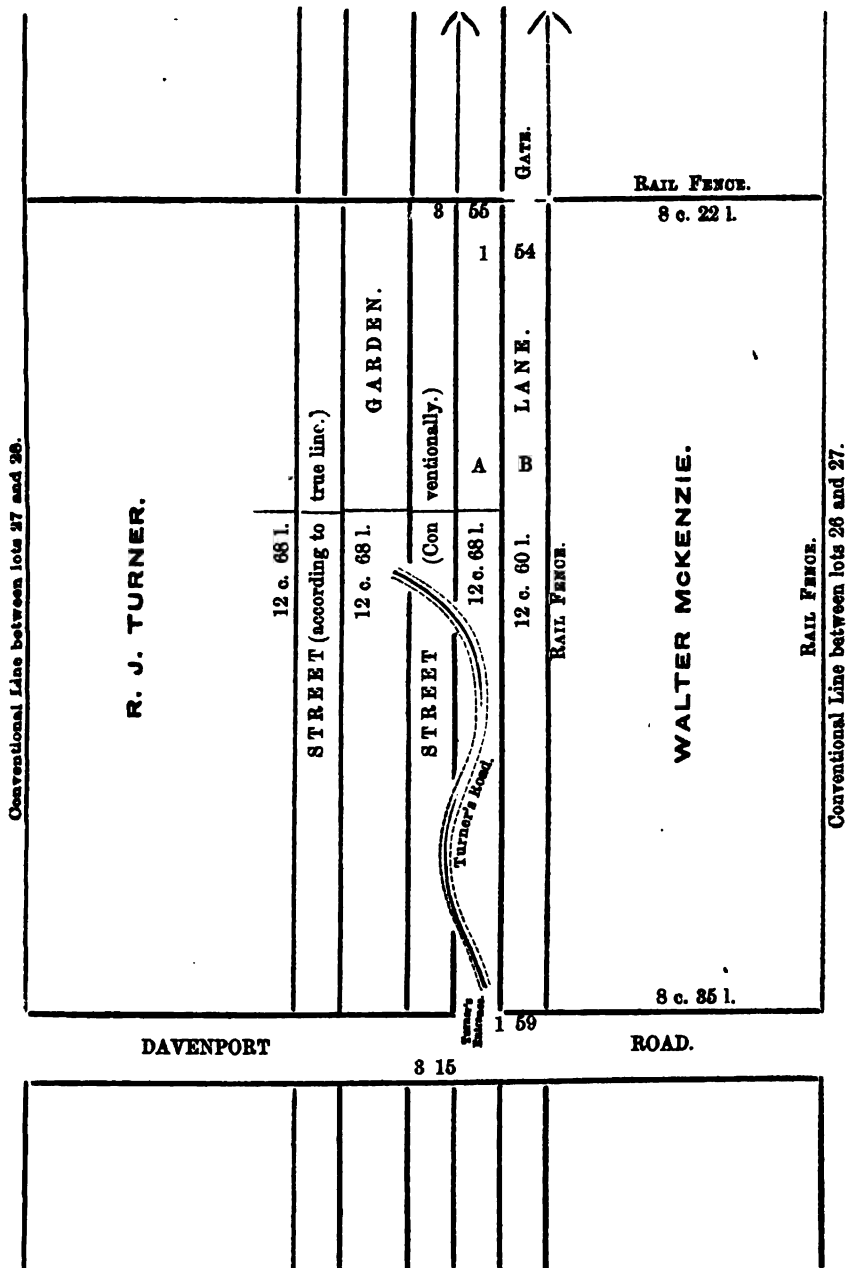
**THE HON. JOHN HENRY DUNN AND WALTER MCKENZIE
v. ROBERT JOHN TURNER.**

Deed—Description of land conveyed.

An oblong tract of land 20 by 100 chains, containing 200 acres, was subdivided into smaller lots with a lane laid out and staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries of the 200 acres. Part of the tract lying to the east of the lane was sold and conveyed; and in the deed of the part so sold reference was made to a plan which shewed the lane as laid out through the centre of the whole tract, and the said lane was therein declared to be the western boundary of such piece. And in the same deed a right of way was granted to the purchaser in and over the said lane or way, being 83 links in width, "*and which said way is already staked and laid out for the benefit of the occupiers of the said lot.*" Afterwards it was discovered that the eastern and western boundaries of the whole 200 acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed: and that, if therefore those boundaries were shifted to their proper places, as had been done by the owners of adjoining lots, the lane as originally laid out and staked could not still continue to be in the centre of the lot when shifted. *Held*, in an action of ejectment by the purchaser of the piece to the east of the lane, that his western limit could not extend beyond the east side of the lane as staked out before the execution of the deed.

This was an action of ejectment brought by the plaintiffs to recover possession of the following property, situate in the township of York in the county of York, being composed of part of lot number twenty-seven in the second concession from the bay in the township of York aforesaid: commencing on the northerly limit of the public road known as the Davenport road, on the said lot, and at the intersection with the said limit of the line of old rail fence at present forming the westerly fence of the said John Henry Dunn and Walter McKenzie, and which point of intersection is about eighty feet easterly from the entrance-gate of the said Robert John Turner, upon the north side of the said road; then from such point south seventy-four degrees, west one chain thirty-nine links more or less, to the easterly limit of a certain street or lane eighty-three links in width, agreed upon as running up the centre of the said lot; thence along the said limit of the said street or lane north sixteen degrees twenty-one minutes west twelve chains sixty-eight links, to the range of the north line of the said Robert John Turner's garden fence; thence north seventy-four degrees east one chain fifty four links more or less, to the old rail fence as aforesaid; thence along the said rail fence south fifteen degrees forty-one minutes, east twelve chains sixty links, more or less, to the place of beginning, and containing by admeasurement one acre

three rods and thirteen poles, as shewn by the following diagram, taken from the one before the court :



The said defendant appeared to the action and defended for the whole of the said property, and the cause was brought down to trial at the last assizes for the united counties of York, Ontario and Peel, when a verdict was taken for the plaintiffs upon the following admissions: It was admitted, for the trial of this cause, that the plaintiffs claimed that portion of land in the above diagram designated A and B, in the writ of summons mentioned, and above described; and that they were entitled to recover the same if, according to the construction of the deeds to the defendant of lot number twenty-seven, and from the defendant to Adam Wilson of part of the said lot, the lane dividing the said lot from north to south be fixed to run through the centre of the said lot, and not to be fixed to the spot where the same was originally staked and laid out (without prejudice to any rights in equity any of the parties might have): and also that by adverse claim the plaintiffs have lost a strip all along the east side of their lot, the same having been claimed and afterwards settled as a part of lot number twenty-six: that it was then claimed the said lot number twenty-seven should go as far to the west as the said lot number twenty-six had gone: that the owner of lot number twenty-eight consented to the same if he in his turn could compel the owner of twenty-nine to yield up as much to him in recompense of what he should lose: that the owner of number twenty-eight afterwards recovered against the owner of twenty-nine the distance which he claimed to be part of his said lot number twenty-eight: that the defendant since the commencement of this suit had taken possession of the ground so yielded up by the owner of number twenty-eight as a part of lot number twenty-seven.

The plaintiffs contended the said line should be removed to the centre of the said lot.

The defendants contended that the same should remain as it was originally laid out and staked.

These admissions were only made for the purposes of this suit.

A verdict was taken for the plaintiffs subject to the

opinion of the court upon the said deeds, or copies, or extracts of such parts as the parties might agree to be sufficient, and upon the above admissions,

Upon reference to the exhibits, they appeared to be the following:—

1. The indenture of the — day of — 1845, made under the Court of Chancery, by which Thomas Bell and others conveyed to the defendant, for the considerations therein expressed, lot number twenty-seven in the second concession from the bay in the township of York, containing 160 acres more or less, as the same was particularly delineated and laid down on the map drawn in the margin thereof and coloured pink; and also all the road or way running through the centre of the said lot number twenty-seven, extending from the road running between the first and second concessions from the bay in the said township of York to the road running between the second and third concessions, and which said road or way thereby conveyed or intended so to be, was then staked out and divided, and was laid down on the said map or plan and therein coloured and was of the width of eighty-three links, excepting and always reserving out of the conveyance therein contained unto the owners or occupiers for the time being of any parcel or tract of land, part of the said lot number twenty-seven, full and free liberty and right of way and passage with horses, carriages, &c., in, over and upon the said road or way thereby conveyed, upon certain trusts therein expressed and contained respecting the same, &c.

2. An indenture of bargain and sale dated the 15th of October 1846, consideration 165*l.* and 5*s.* &c., recites certain other deeds of conveyance of portions of the aforesaid lot number twenty-seven, including the deed above-mentioned; and that Adam Wilson had contracted to purchase those parts of the said lot number twenty-seven known on the aforesaid plan as numbers twelve and thirteen on the east side of a certain way laid out on the same plan, and running from north to south through the centre of the said lot number twenty-seven, containing by admeasurement eleven acres and a half more or less, and more particularly

described as "commencing at a stake now planted at the easterly side of the said lot number twenty-seven, where lot number twenty-six, in the said second concession and the public road running in front of the said parcel number twelve on the north side of the said road meet; then northerly along the easterly limit of the said lot number twenty-seven on a course north sixteen degrees west eleven chains sixty-nine links, to a stake; then on a course south seventy-four degrees west nine chains fifty links, to the way running through the centre of the said lot; then southerly along the westerly (should be easterly) side of the same way on a course parallel with the easterly side of the said lot twelve chains sixty-four links, to the public road aforesaid running in front of the said parcel number twelve; thence on a course north sixty-eight degrees east along the north side of the said public road to the place of beginning. And also the right of way for the said Adam Wilson, &c., and all claiming under him, with horses, carts, carriages, &c., and on foot or otherwise as he or they might think fit, at all times and seasons, &c., in, over and upon that certain part of the said lot number twenty-seven, and running from the front of the said lot on the second concession to the rear thereof on the third concession from the bay, and being in width eighty-three links, *which said way is already staked and laid out for the benefit of the occupiers of the said lot.*" To hold in fee.

It was admitted the plaintiffs claimed under this deed.

The original deeds and plans therein referred to were not before the court, but only draft copies of the deeds, and a plan which the court assumed as correctly corresponding with the original in those parts which were material to the action.

Wilson, Q. C., for the plaintiffs, contended the first monument called for—viz., a stake at the south-east angle of the tract—was not planted correctly; wherefore the true course, and not the stake, should govern: that it was supposed to be placed correctly, but was not: so also, that the lane was supposed to be in the centre of the lot, but was not; and that it was only adopted as the west boundary of the

plaintiffs' tract upon that assumption: that to hold otherwise would be against the plain intention of the parties; and the effect would be to curtail the plaintiffs' quantity, by reason of a part supposed to be purchased by them being taken off by the adjoining lot on the east: that the intention should prevail, and the manifest intent was, that the lot should be divided by a lane into two equal parts; and the plaintiffs to receive a portion of the south-east half, commencing at the south-east angle of the tract: that the intent was to transfer a tract nine chains and fifty links, which forms the east side of the lot to the centre lane, which was not done; and that the general intent should prevail: that the artificial boundaries called for do not fulfil the intention, and must therefore be overlooked; and must yield to the plain paramount intention, which ought not to yield to false descriptions and misplaced stakes: that the plan referred to in the deeds shewed the intention to be as he contended—*Fewster v. Turner*, 6 Jur. 144; *Lambe v. Reaston and wife*, 5 Taunt. 207; *Wilkinson v. Malin and others*, 2 Tyr. 544.

Vankoughnet, Q. C. for the defendant, said it was of no moment where the description was to begin, for the tract was clearly to be bounded and limited, not by a supposed central lane, but by a lane already laid and staked out for the very purpose of defining the west limit of the east half of the lot: that, had the stakes supposed to be at the south-east angle of the tract been a chain or two west of it, and upon the lot granted, instead of too far east of it, plaintiffs would be entitled to all east of it up to the west lot. At all events, that the deed as to intent was to be considered as at the time of execution, at which period the stakes were supposed to be accurately placed, and were intended to govern; and that such intent could not be altered or affected by reason of subsequent disputes or discoveries respecting the true limits of lot No. 27, and the adjacent lots. He referred to *Doe ex dem. Miller v. Dixon*, 4 O. S. 101; *Doe ex dem. Murray v. Smith*, 5 U. C. R. 225; *Doe ex dem. Notman v. Macdonald*, *ib.* U. C. R. 321; *Doe ex dem. Gildersleeve v. Kennedy*, *ib.* U. C. R. 402; *Doe ex dem. Smith v. Galloway*,

5 B & Ad. 48; *Scralton v. Brown*, 4 M. & C. 485, 505; *Marshall v. Hopkins*, 15 East. 309; *Llewellyn v. The Earl of Jersey et al.*, 11 M. & W. 183.

MACAULAY, C. J.—It appears to me the plaintiffs' westerly limits cannot extend beyond the easterly side of the lane or way that had before the execution of the deed been already staked and laid out for the benefit of the occupiers of the lot.

The lot is a large oblong tract of 200 acres of land, being twenty chains wide and one hundred deep. This lot was sub-divided into smaller tracts to be sold, with a lane or road up the middle; and might become the property of many owners on both sides of the way, which was to be common to all. Each and all were to be bound by it on both sides of such way, as already laid out. It was supposed to be in the centre, and really was according to the then understood boundaries of the lot number 27. But if it was not, after all the lands had been conveyed away in sub-divisions according to the plan, the occupiers, or owners on one side could insist upon the lane being altered so as to encroach upon the lots on the other side—all would be liable to disturbance at any time within twenty years; and the very object and precaution of laying and staking out the road, as the division between east and west ranges of lots, before they were disposed of, would be frustrated and rendered useless.

It is not merely a description by reference to a plan, which plan is to be applied to the ground according to the exact limits of lot No. 27, to be ascertained according to the statute 12 Vic. ch. 35. The tracts are described in reference not only to a plan, but to the stakes planted to mark the south-east and north-east angles of the tract, and the lane and way, which is expressly declared to be the boundary of such tracts on the west. And the right of way already staked and laid out for the benefit of the occupiers of the said lot is expressly granted by the deed to Mr. Wilson, on the 15th October 1846, in, over and upon that part of the said lot No. 27, 83 links in width, which had been so staked and laid out.

Reverse the case, and suppose the stakes called for as being on the easterly limit of lot No 27, and at the south-east and north-east angles of the tract conveyed, were really to the west of that line instead of to the east, could the owners of the half lot west of the lane insist upon its being moved east upon the owners of the east half; or if not, would the plaintiffs be entitled up to the true division line between lots Nos. 20 and 27, or would the space between that line and the line of the stakes still belong to the defendant as former owner of the east half, of the lot? I apprehend that in that event the true division would contract the stakes—the predominant intention being to convey from the easterly limit of lot No. 27 towards and up to the lane in the centre thereof. What the effect of a very wide deviation might be—as, if the lane was laid out through the easterly quarter, or eighth, or sixteenth part of lot No. 27, divided from north to south—it is unnecessary to consider; but I am not prepared to say it would, in my view, make any difference.

McLEAN, J.—By the deeds it appears that the late Peter McDougall had divided the Lot No. 27, as he then held it, into parcels, dividing the lot by a lane or way from north to south, at what was considered the centre of the lot (the lane or way being then staked out and marked upon the ground eighty-three links in width), and to be used by all parties who might purchase any of the parcels of ground adjoining it. Subsequently it was discovered that the line between Lots Nos. 26 & 27 had not been properly established; and that a quantity of ground, equal in width to what the plaintiffs now claim, part of No. 26, was included within the limit of No. 27 as laid out by McDougall. The owner of No. 26 brought ejectment and recovered the land claimed by him. The owner of No. 28 then agreed to give up to the owner of No. 27 the same quantity of land, provided he could recover an equal quantity from the party in possession of No. 29. Having recovered in ejectment, he gave up, as part of No. 27, ground of the same width as that which was lost on the eastern boundary: the ground thus given up has been taken possession of by defendant, and he holds from

the lane or way referred to to the western limit of No. 27. The plaintiffs seek to recover their proper breadth, and there appears to be land enough in the lot to give to all what they are entitled to. The defendant, who purchased according to the division of the lot and the plan of it made by McDougall, resists the plaintiffs' right to recover on the ground that, whether they have their compliment of land or not between the lane or way staked and laid out at what was considered the centre of the lot and the present eastern limit, the plaintiffs cannot legally claim the land composing the lane or way, or any land beyond it. The premises were all transferred to the defendant under the direction of the Court of Chancery, and he was a trustee for such parts as were not included in his own purchase. As such trustee he conveyed to Adam Wilson, Esq., the block or parcel of land known as No. 12 in the sub-division, north of the Davenport road and adjoining the eastern limit as it then stood, the stakes and boundaries being marked on the ground. The deed bears date the 15th day of October 1846, and describes the premises as commencing at a stake *now* planted at the easterly side of the said Lot No. 27, where Lot No. 26 in the said 2nd concession and the public road running in front of the said parcel No. 12 on the north side of the said road meet; thence northerly along the *easterly* limit of the said No. 27, in a course north sixteen degrees west eleven chains and sixty-nine links *to a stake*; then in a course south seventy-four degrees west nine chains and fifty links *to the way* running through the centre of the said lot; then southerly along the westerly (should be easterly) side of the same way, in a course parallel to the easterly side of the said lot, twelve chains sixty-four links, to the public road aforesaid running in front of the said parcel No. 12; then along the north side of the said public road to the place of beginning. And by the same deed a right of way is conveyed to Mr. Wilson in, over and upon that certain part of the said Lot No. 27 running from the front of the said lot in the 2nd concession to the rear thereof, being in width eighty-three links, and which *way is already staked and laid out for the benefit of the occupiers* of the said lot.

By the deed to the defendant the way is granted and conveyed to the defendant, and it is therein stated that it *had then been staked out and divided*; and a right of way is expressly reserved to the owners and occupiers for the time being of any parcel or tract of land, part of the said Lot No. 27. For the convenience of all parties who might purchase any portion of No. 27, the way through the supposed centre of the lot was established; and by the reservation in the deed to the defendant all are entitled to enjoy it. That way was staked out and marked on the ground, and all purchasers could see the particular ground upon which they had a right to pass and repass to their own premises. Their right to use that way cannot now be affected by any alteration in the boundaries of the whole lot. The way must still remain where originally staked out, though it now appears that it is not, as it was intended, in the centre of the lot, and that the description of it as in the centre of the lot is a mis-description in the deed. If the plaintiffs were entitled to recover in this action, the right of way which all purchasers stipulated for would be taken from them, and they would have to take another piece of ground in lieu of it, one chain and thirty-nine links further west. The parties having acquired a right to the particular piece of ground marked by metes and bounds, cannot now be deprived of that right; and, however hard it may be on the plaintiffs to be deprived of a considerable portion of the land purchased by them, especially when the land is actually contained in the lot, I do not think they can obtain relief in this action. The defendant has more than his fair complement of land under his purchase; but I cannot see that he has any belonging in strictness to the plaintiff. My opinion therefore is, that the defendant is entitled to judgment.

SULLIVAN, J. concurred.

Judgment for defendant.

NOTE.—On Wednesday, 8th December 1852, Mr. *Wilson* applied for a new trial, suggesting that deeds prior to those in evidence, might affect the question of boundaries. On the following day Mr. *Gwynne*, for Mr. *McKenzie*, renewed the application; and Mr. *Wilson* asked a nonsuit.—The court expressed themselves ready to adopt any course by consent; but otherwise

BROUGHAM v. BALFOUR.

Trespass q. c. f.—New assignment—Liberum tenementum.

Trespass q. c. f. Plaintiff declared for trespasses to his close, describing it. Defendant pleaded soil and freehold to the whole close. Plaintiff replied a demise of the whole close to himself from defendant. Defendant, admitting the demise, rejoined leave and license from plaintiff to commit the trespasses complained of. Plaintiff traversed the alleged consent or leave, and new assigned trespasses on other occasions, and for other purposes, but adhered to the same close. Defendant again pleaded soil and freehold to the new assignment: *Held*, on demurrer to such plea, that it was bad, as tending to endless prolixity, as being inconsistent with the previous pleadings, and as being a departure therefrom.

TRESPASS quare clausum fregit. Writ issued 8th June 1852. Declaration dated 23rd August 1852.

2nd count stated, that defendant, on the 29th May 1852, and on divers other days and times between that day and the commencement of this suit, *vi et armis*, broke and entered a close of plaintiff in the Gore of Toronto, known as the yard attached to the Commercial Hotel in the village of Stanley (specially described), and made a great noise therein, and continued therein making such noise for a long time, to wit, two days, and then broke and damaged the

did not see that the request could be granted. Mr. *Gwynne* argued that the defendant was estopped from denying that the tract was bounded by a lane in the middle of the lot No. 27; and, as was understood, said that if the present stakes were not on the true lines—in other words, if the centre of the 88 links as thereby indicated, is not the true centre line of lot No. 27—they were to be disregarded; and that a lane in the centre, wherever that might be, is called for by the deed and plan, and could not be contradicted or controlled by any expression therein, or by the stakes previously planted, if incorrectly placed, because the defendant is estopped or precluded from setting up any lane not in the centre, whether previously staked out or not. The Chief Justice remarked that if he understood him correctly, he did not accede to such a view of the case, but thought the lane as already laid out, (which was assumed and then supposed to be central) was intended to, and must govern and control. He did not think the defendant was estopped any further than the plaintiffs were estopped, and that both were estopped from setting up any other lane in any other part of the lot No. 27 different from that which had been staked out, and which was specifically called for and referred to in the deed.—He also observed that he was not disposed to think the plaintiffs concluded by the result of this ejection under the late act, 18 & 14 Vic. ch. 114, sec. 8, any more than under the old practice; and that, if at all events, the plaintiffs cannot bring another action—they might appeal the present one to the Court of Appeal. He said that all the facts material to the question were fully stated; and that he did not see that any deeds between other parties as former holders of lot No. 27, could affect, control or govern the deed from the defendant to Mr. Wilson, so far as respects the question of the tract thereby conveyed being bound on the west by the way, which at the time of the execution thereof had been already laid out for the benefit of the occupiers of the said lot.

gates, locks, staples and hinges belonging to said gates; whereby plaintiff was disturbed in the enjoyment of his said yard, &c.

3rd plea, of 8th September 1852, as to so much of the said 2nd count as related to the breaking and entering the said close and committing thereon the trespasses therein mentioned—that the said close, at the said times when, &c., was and is the close, soil and freehold of the defendant; wherefore defendant, at the several times when, &c., broke and entered the same and committed thereon the supposed trespasses therein mentioned: verification.

Replication—That while the said close was the close, soil and freehold of defendant, and before the said several times when, &c., to wit, on the 1st June 1851, defendant demised the said close with the appurtenances to the plaintiff for one year thence next following, and so on from year to year, for so long time as defendant and plaintiff should please; by virtue of which said demise plaintiff afterwards, and before the said several times when, &c., entered and was possessed, and continued so possessed of the said close from thence, until defendant afterwards, and during the continuance of the said demise, to wit, at the said several times when, &c., of his own wrong, broke and entered the said close, and committed the said several trespasses in the introductory part of the said 3rd plea to the said 2nd count mentioned, in manner and form as the plaintiff hath above thereof in the said 2nd count complained against defendant: verification.

Rejoinder—That, after the time of the making the said demise in the replication mentioned, the plaintiff consented and agreed that the defendant and his servants, and all others having business with defendant, should at all times thereafter have leave to pass and re-pass at all times across, along, over, and upon the said close; by reason whereof defendant and his servants and visitors, from the time of the making of the said demise until the said times when, &c., did at their free will and pleasure pass and re-pass through, over and upon the said close: and at the said times when, &c., because the said gates in the said 2nd count mentioned

were, at the said times when &c., fastened by staples and locks, by some person to the defendant unknown, and without notice from the plaintiff to defendant of his intention to fasten the same, defendant, for the purpose of passing over the said close as he had been accustomed to do, removed the said staples and locks from the said gates, as he lawfully might, doing no unnecessary damage to plaintiff; which are the several trespasses in the said replication alluded to, and whereof the plaintiff hath thereof above complained &c. : verification.

Sur-rejoinder—Traverse of the alleged consent and agreement, not concluding to the country.

Plaintiff then new assigned, that he commenced his action and declared therein, as in the 2nd count, not only for the trespasses in the said rejoinder to the said replication mentioned, &c., but also for that the defendant, on the said several days and times in the said 2nd count mentioned, *vi et armis*, broke and entered the said close in which, &c., and there made a great noise, &c., and so continued—to wit, for two days—and broke the gates, locks, hinges and staples, &c., on other and different occasions, and for other and different purposes than the occasion and purpose in the said rejoinder mentioned, in manner and form as the plaintiff hath in the said 2nd count complained; which trespasses so newly assigned are other and different trespasses than those in the said last rejoinder mentioned, &c. : verification.

4th plea, to the new assignment to the said trespasses newly assigned, that the said close in which, &c., in said new assignment mentioned, at the said times when, &c., in said new assignment also mentioned, was and is the close, soil and freehold of the defendant; wherefore he, in his own right, at the said times when, &c., in the said new assignment mentioned, committed the said newly assigned trespasses, as he lawfully might, &c. : verification.

Demurrer—1st. Because, though the close was defendant's freehold, he had already admitted that the plaintiff, at the said time when, &c., was possessed thereof by demise from defendant.

2nd. That it tended to prolixity.

3rd. That it contradicted the rejoinder, which admits the plaintiff possessor by demise, and alleges his leave and license to enter at the places where the trespasses are alleged to have been committed.

4th. That it departed from the rejoinder; for if plaintiff could grant leave and license to enter, it is no defence that the reversion in fee was in defendant.

Plaintiff joined in demurrer.

Halkinam, for the demurrer, contended that the plea of *liberum tenementum* admits the possession in plaintiff and sets up a better title, which it does not do here, as the nature of the plaintiff's possession is specially shewn in his replication—namely, as tenant from year to year under the defendant—and which title the defendant admits by his rejoinder, and from which the last plea is a departure—*Morse v. Apperley*, 6 M. & W. 145; *Prettyman v. Lawrence*, Cro. El. 812; *Wilkinson v. Walker*, 2 U. C. R. 162; *Wood v. Leadbitter*, 13 M. & W. 838.

Bell, for defendant, contended that the trespasses newly assigned were not alleged to be during the continuance of the term, and might be proved before its commencement, or after its expiration, in which event defendant would be without defence unless he again pleaded *liberum tenementum*—*Lethbridge v. Winter*, 2 Bing. 49; *Tyr. Plg.* 668; *Storman v. Wescombe and another*, 2 M. & W. 349; *Pugh v. Griffith*, 7 A. & E. 827. *Bac. Ab.* "Trespass, I. 4 (2)" That no new assignment was necessary.

Halkinam, in reply, said, cases of new assignments of other closes, or without a traverse of the plea, are not to be confounded with the present, which, adhering to time and place, merely assigns other and different occasions and purposes; and that a new assignment was necessary—*Barnes v. Hunt* (11 East. 451) being virtually overruled: that the plaintiff could not new assign another close without a departure, and is bound by the description in the declaration.

Plaintiff noted that he would contend the rejoinder was bad for not stating the license to be under seal or in writing.

At the argument, the plaintiff's counsel contended this general ground of demurrer could not be supported, because due notice had not been given. It was admitted notice thereof was served on Saturday, a week before the day the case was set down for argument, and before the delivery of the demurrer books in the margin of which it was noted.

MACAULAY, C. J.—The notice was served in sufficient time—see the case of *Jones v. Dunn* (1 U. C. C. P. 204–8); but the rejoinder being traversed, I do not see that its sufficiency in law is before us on this demurrer. The facts are denied, independently of the new assignment, the 4th plea to which is the subject of the demurrer.

The cases (a) shew that the plaintiff's traverse of the rejoinder and the new assignment are authorised.

If the 4th plea to the new assignment is good, the plaintiff may reply a demise *de novo*, and the defendant may re-assert a consent and agreement to pass and re-pass, &c., to which the plaintiff again new assigns; and so the pleadings go on in a circle *ad infinitum*, without the parties coming to an issue: and I am disposed to think that circumstance a valid objection, on the ground of endless prolixity, tautology, &c., notwithstanding what is said in *Norman v. Wiscombe* (2 M. & W. 349), *Wheeler v. Senior* (7 M. & W. 569). That the plea is tautologous is clear, for the close is the same throughout; its identity is not brought in question. In *Norman v. Wiscombe* (2 M. & W. 349) the facts pleaded to the declaration were repeated in reply to the new assignment, and then traversed; but there the plea to the declaration and the plea to the new assignment ostensibly related to different trespasses; here they relate to the same identical close—not different closes—*Brancker v. Molyneux* (1 M. & G. 710), *Ellison v. Isle* (11 A. & E. 665),

(a) *Heydon v. Thompson*, 1 A. & E. 210; *Wheeler v. Senior*, 7 M. & W. 562; *Loweth v. Smith et al.*, 12 M. & W. 582; *Worth v. Terrington et al.*, 13 M. & W. 781; *Wright v. Burroughes et al.*, 3 C. B. 685, 10 Jur. 968; *Page v. Hatchett*, 8 Q. B. 187; *Bracegirdle v. Peacock et al.*, 8 Q. B. 174; *Polkingham v. Wright*, 8 Q. B. 197; *Robertson v. Gaultett*, 16 M. & W. 289; *Harvey v. Laukester*, 18 L. J. Q. B. 299; *Curlewes v. Lawrie et al.*, 12 Q. B. 640; *Pugh v. Griffith*, 7 A. & E. 827; 1 Saund. 299 (c); *Adams v. Andrews*, 15 Q. B. 286.

Bolton v. Sherman (2 M. & W. 395), *Bond v. Downton* (2 A. & E. 26).

In *Smith v. Royston* (8 M. & W. 386) it is laid down that where the close is described in the declaration "the close in which," &c., in a plea of *liberum tenementum*, requires only that the defendant should prove that part of the close in which the trespasses were committed to be his property; in other words, that part of the close in which he admits he had done the acts complained of—and see *Cocker v. Crompton et al.* (1 B. & C. 489), *Richards v. Peake* (2 B. & C. 918).

If therefore the new assignment had been upon a different part of the close than that mentioned, intended or embraced by the plea and rejoinder, it might have been proper for the defendant to have replied *liberum tenementum* to that part of the close newly assigned; but, unless the rejoinder narrows the plea to those parts of the close in which, &c., covered by the alleged license or consent, I do not think that it would be admissible, nor do I mean to say it would even then: however, the plea is as general as the declaration, and in terms extends to the whole close, the trespassing in which is thereby justified *prima facie*.

The trespasses to such close, as laid and intended in the declaration, are repeated in the replication in general terms, and again re-asserted in the new assignment in addition to those sought to be justified by the rejoinder, and all not only in the same close but in the same part of the close and within the same period of time, although on other and different occasions and for other and different purposes.

Had the plaintiff new assigned any trespasses not mentioned or embraced in his replication, it would have been a departure—but he does not do so; he merely states that he goes for other trespasses, and on different occasions, and for different purposes than those covered by the rejoinder. It is not clear to me that the rejoinder does not depart from the plea, which is that it was the defendant's freehold, and so justifies his entry, &c. The replication sets up a demise for a term of years, and so shews possession in the plaintiff, notwithstanding defendant's reversion in fee: then the

defendant rejoins leave and license to enter. Assuming that the plea may have contemplated trespasses to other parts of the same close not demised, and that the demise covers only a part, they would be consistent; but then the objection is, that the demise, as stated in the replication, is of and includes the whole close. The plaintiff declares for trespasses to the whole close, describing it; the defendant pleads soil and freehold to the whole close, not to any specified part less than the whole; the plaintiff replies a demise of the whole; the defendant rejoins leave and license to all the trespasses; the plaintiff traverses the alleged consent, and now assigns trespasses on other occasions, and for other purposes; the defendant re-pleads soil and freehold, after having admitted a demise for years, and without denying or controverting it. If the term had ceased he might have so pleaded it, as it is its continuance must be intended, and it must be intended that the trespasses newly assigned were committed during its continuance. If before or after the demise, it appears to me the defendant's proper course would have been to have so alleged, and then justified those trespasses, instead of repeating the plea of soil and freehold and leaving the alleged demise untouched. If he so pleaded with a view to trespasses before the commencement of, or after the termination of the demise, or on parts of the close not denied, it is only done argumentatively and ambiguously, whereas with any such views the demise should have been alleged to cover only a definite part less than the whole of the close, or to have ended or not to have commenced at the time when the trespasses supposed were committed. How far this could be done after rejoining leave and license to a replication stating a demise of the whole close, it is unnecessary to consider. It appears to me the 4th plea to the new assignment is a repetition of the 3rd plea to the declaration: that the trespasses newly assigned must be intended to be laid during the demise; and that such demise is of the whole close, as described in the declaration: that the defendant should have traversed the trespasses newly assigned; when, if the plaintiff could not prove trespasses on any or other

occasions, or for other purposes than those alleged in the rejoinder, and for which the defendant could prove consent and agreement, he would fail upon the issue. Whether the rejoinder sufficiently justifies the trespasses to which it is pleaded, might have been made a question on demurrer. It states, admitting the locks and gates to be the plaintiff's, that because the defendant found the gates locked, without having received notice from the plaintiff, and without knowing or enquiring by whom, he broke the locks, &c., whereas if they were the plaintiff's locks, it behooved the defendant to ascertain who locked the gates before he broke in; for, if the plaintiff did it, it was a very significant indication that he had, for the time being, revoked or suspended his consent to the defendant's passing *ad libitum*: at all events, he could not be presumed to have consented to the defendant's breaking his locks, which could only be justified upon the assumption of something equivalent to a grant of the easement alleged, not a mere license revocable at pleasure for all that appears, unless the term "agreed" imports a mutuality of consideration, and a binding contract equivalent to a grant or irrevocable license: however, it is not material as the case is before us.(a)

SULLIVAN, J.—The common bar in trespass *quare clausum fregit*, or *liberum tenementum*, has always been understood by lawyers to involve a fallacy in pleading, or an imperfect defence, inasmuch as the plaintiff does not in the usual count for a trespass of this nature, allege, or profess to allege a freehold estate in the close in which he complains that the trespass has been committed; and therefore, inasmuch as the plaintiff might have any title less than freehold, which would enable him to maintain trespass against the owner of the soil, and as he only asserts such a title, the plea could not be one in denial, neither could it be held a complete plea in justification or in confession and avoidance. It is said to have been admitted, for the purpose of forcing the plaintiff to specify the land or close upon which he complained that the trespass was committed;

(a) See *Williams v. Norris*, 8 M. & W. 488; *Wood v. Leadbitter*, 13 M. & W. 688; *Wood v. Manley*, 11 A. & E. 84.

for he had only in his declaration to allege a trespass in his close, in a certain villa, in a certain county. If the defendant were to plead that the close was his soil and freehold, the proof of the issue would lie on the defendant, and all he would be required to prove would be that he had a freehold in the villa, or parish, or county, where the plaintiff had in his count placed his close, according to the particularity with which its locality was set forth. The consequence was, that unless the plaintiff chose to run the risk of proof of title in some place answering the description in the count, he could not safely traverse the plea of *liberum tenementum*. This forced him to a new assignment, which would specify the close upon which he complained of the trespass, by abutments and boundaries, or otherwise, by way of new assignment. To this new assignment the defendant could, I think, unquestionably again plead *liberum tenementum*, or any other defence; but if he were to plead the common bar again, he would be liable to have it traversed; or, if it happened to be true, as in the present case, a lesser title under him might be replied, sufficient to maintain trespass as against him.

In the first case, however, the plea of *liberum tenementum* was liable to be traversed as well as in the second, the risk which the plaintiff would run in each case being the same—namely, of the defendant proving a freehold within the description of the count, or of the new assignment. The necessity for a new assignment as to place might always have been avoided by a description in his count, of the close or place in which, &c., by name or by abutments and boundaries, where the plaintiff was sure that within these a freehold in the defendant could not be proved; and this course is constantly recommended in the treatises on pleadings, where the dilatory pleading was apprehended. When the plaintiff has new assigned as to place, he is merely in the situation of one who had in his count described his close specifically, and when he has so described it by way of new assignment, I think all defences are open to the defendant which he would have had if the specific description had been in the count in the first place,

and in that sense a new assignment may be said to be a new declaration. All is so far consistent and logical; but I see no ground for supposing that when the place is once ascertained, and a plea other than *liberum tenementum* pleaded, and a title less than freehold in the plaintiff set out in the place so ascertained, and that title under the defendant, that he, the defendant is at liberty merely because of a new assignment, having nothing to do with locality or title, to plead again *liberum tenementum*. The plaintiff in this case, after fixing the place, the title under which he assumes to maintain the action of trespass, and the time within which he asserts, and within which he is bound to prove the trespasses to have been committed—that is to say, during the subsistence of the title less than freehold under which he claims—and when all this has been fixed by the defendant's plea of leave and license, new assigns trespasses within the place within the time; and the action for which is supported by the title already pleaded and admitted is met by a plea of *liberum tenementum*, which would be only good as inconsistent with the title already pleaded and admitted by the defendant, but which title, as it seems to me, the plaintiff is not only estopped to deny in this action, but probably in all future actions or occasions where such a title may hereafter come in question between the same parties or their privies in estate. This is an absurdity to which no rules of special pleading could lead, and which I have never seen any authority to justify. The defendant in this case, in pursuance of the same question of right in the very same current pleading, claimed a right under the defendant to enter upon the *locus in quo*, and he now turns round to say that he had the same privilege in his own right as having the freehold in the same place. This, I think, is certainly a departure in pleading which makes the plea demurred to in this instance bad.—See Chitty on Pleadings, 7 ed. 538-9, 653-4.

I cannot find from any authority that the plaintiff is at liberty to depart in any respect from his count, when he replies by way of new assignment. For example—if he

declared upon a trespass or trespasses in black acre, he could not upon *liberum tenementum* pleaded, new assign a trespass or trespasses elsewhere, whether he abandoned his count and went altogether upon the new assignment, or whether he meant to adhere to the trespasses attempted to be justified, and wished to assign others in addition. In like manner, if the declaration alleged but one trespass, and the defendant pleaded justifying one, the plaintiff could not, without a departure, new assign, saying that his action was brought not only for the one trespass attempted to be justified, but also for another and distinct trespass. Neither, if such a mode of declaring were admissible, or were not demurred to, and the plaintiff were to declare upon an estate less than a fee, and were to trace his title from the fee in his declaration, and to allege further that the trespasses for which he sued were committed during the subsistence of his title, could he reply by way of new assignment, going for trespasses committed at other times than during the continuance of the title declared upon. A case occurred in this court—*Johnstone v. Odell* (1 U. C. C. P. 395), in which such a mode of declaring was pronounced not admissible, but the title was, moreover, not completely stated, and the plea of not possessed was held good.—See *Stephens on Pleading*, 431; *Dyster v. Batty et al.* (3 B. & A. 448), *Page v. Halchett* (8 Q. B. 187), *Cheesly v. Barnes et al.* (10 East. 73), *Loweth v. Smith* (12 M. & W. 582), *Worth v. Jenington* (13 M. & W. 781, 1 Wm. Saund. 299, 300), *Polkington v. Wright* (8 Q. B. 197), *Earl of Manchester v. Vale* (1 Wm. Saund. 24), *Burgess v. Freelove* (2 B. & P. 425). In the case before us the *locus in quo* was ascertained with precision in the count. It was once doubted whether in such a case the plea of *liberum tenementum* could be supported—*Lambert v. Shother* (Willes R. 222); but it has been since established—*Brest v. Sever* (7 M. & W. 595), *Doe v. Wright* (10 A. & E. 781). That the common bar is a good plea, even if the close in which, &c., be precisely described, because the plea is taken to give implied colour to the plaintiff by admitting such a possession in him as would

maintain the action against a wrong doer, but to assert a freehold in the defendant, with the right of immediate possession. But in the present case the plaintiff has replied, not denying the freehold estate of the defendant, but setting forth a temporary title to the immediate possession under the defendant, inconsistent with the denial with colour, attributed to the plea of *liberum tenementum*, and alleging that the action is brought for trespasses committed during the continuance of the demise replied.

Any plea of *liberum tenementum*, by the defendant in the same close, if it be held to assert a right to immediate possession in the defendant, is bad as giving no color, for it is a denial by implication of the title set up by the plaintiff, to which the plaintiff is confined by his replication. It not being open to the plaintiff to rely upon mere possession as against a wrong-doer, the only colour which is supposed to support the plea of *liberum tenementum* fails; and the plaintiff having confessed a freehold in the defendant, and having avoided, by showing a title under him, a plea not traversing that title, but re-asserting an estate in the defendant, can only be regarded as an admission that the plaintiff's replication is true.

The new assignment that the trespasses were committed on other and different occasions, and for other purposes than those attempted to be justified under the plea of leave and license, is no new assignment of place, or time, or title, to each of which the pleading was conclusively confined; and therefore, as the title of the defendant was one which confessed and founded itself upon a freehold title in the defendant, the re-assertion of that freehold title, without denying the alleged one derived from it, appears to me to fortify rather than to traverse by implication the plaintiff's case. I think, therefore, that the plea of *liberum tenementum* demurred to in this case is bad in substance, as it certainly is in form, as leading to endless and inconclusive special pleading.

The new assignment of trespasses on other and different occasions would perhaps have been more correct had it re-asserted that the trespasses newly assigned were committed within the time during which the term subsisted,

but this had been in substance alleged in the plaintiff's previous replication, in which he alleges that the trespasses for which he sues were committed during the continuance of the term. The plea of not guilty would be sufficient to meet any proof of trespasses after the expiration, or before the creation of the term mentioned in the replication, because the plaintiff, at the trial, would manifestly be confined in evidence to trespasses within the period assigned in his replication.

McLEAN, J., concurred.

Judgment for demurrer.

BENNS V. RAYMOND.

Assumpsit—Materiality of issues.

Assumpsit. Declaration—that the plaintiff having an agreement for a lease of a certain mill-privilege from A. B., the defendant offered for the plaintiff's right to such privilege, certain specified lands and promissory notes, or the assignment of a mortgage for £500; and "that the defendant agreed to accept one of the said offers on or before the 18th of March 1851, and to pay the water rent of the said privilege up to the 1st of January 1851;" and that it was further agreed that the lease should be made to the defendant from the said A. B., and that the plaintiff did "afterwards, on the 18th of March 1851, accept an assignment of the said mortgage," (one of the offers). *Held*, that as the *onus* of procuring a lease was assumed by the plaintiff, the payment of rent up to the 1st of January 1851 was of no consequence to the defendant, and not material, if the plaintiff obtained the lease; and that therefore a traverse of such payment was an immaterial issue.

Quere, the materiality of the plea traversing the allegation of the acceptance of the assignment of mortgage, and the effect of that plea.

ASSUMPSIT. Writ issued 16th of May 1851. Declaration, 22nd of August 1851. Third count states, that the plaintiff, before and at the time of the agreement after mentioned, was in possession of a certain mill-privilege and appurtenances, &c., under and by virtue of a certain agreement made on the 1st of January 1849, between the Grand River Navigation Company and the plaintiff, for a lease thereof for the term of twenty-one years, to commence on the day and year aforesaid, of which the defendant had notice; and that heretofore, to wit, on the 5th of February 1851, by agreement between the plaintiff and the defendant, it was agreed between them that the defendant, for the plaintiff's mill-privilege, &c., so far as belonged to the plaintiff, offered the plaintiff certain specified lands in Howard or else in Nottawasaga, and one Brown's note for

£80, and one Gamble's note for £25, or else the assignment of a mortgage given by one David Cook for certain lands in Hartland, State of New York, for \$2000, or £500, with interest at six per cent., dated 28th of November 1849, payable in one year, subject to a claim of £225 thereon; and that the plaintiff *agreed to accept* one of the aforesaid offers for his said mill-privilege, &c., *on or before the 18th of March* then next (1851), *and to pay the water-rent of the said privilege up to the 1st of January then last* (1851); and that it was further agreed that the lease should be made to the defendant from the said Navigation Company. The plaintiff averred that he did afterwards, and before the time limited therefor had expired—to wit, on the 18th of March 1851—accept one of the aforesaid offers of the defendant, to wit, the assignment of the said mortgage, &c.: then mutual promises of performance were alleged, thus “and in pursuance thereof, and the said agreement being so made afterwards, upon the day and year last aforesaid, in consideration thereof, and that the plaintiff at the request of the defendant, had then promised the defendant to perform the said agreement on his part, the defendant undertook, and then promised the plaintiff to perform the said agreement on his part: that although the plaintiff performed all things therein contained on his part, and had been at all times, from the making of the said agreement, ready and willing, and able to procure the lease to the defendant of the said mill-privilege, &c., from the said Navigation Company, for the remainder of the time then to come, &c., and did offer to procure such lease for the defendant, of which he had notice, and the plaintiff requested him to accept the same and to assign the said mortgage, &c., to the plaintiff, yet the defendant did not, nor would when so requested, accept the lease or assign the mortgage to the plaintiff, but neglected and refused so to do; by reason whereof,” &c.

1st. plea to the 3rd count—Non-assumpsit.

19th plea, or 2nd plea to the 3rd count—That the plaintiff did not at any time after making the said agreement, and before the time for so doing according to the said

agreement, had expired, except the assignment of the said mortgage, &c., as the plaintiff hath in that count alleged—concluding to the country and issue.

20th plea, or 3rd plea to the 3rd count—That the plaintiff did not pay the water rent of the said mill-privilege up to the 1st of January 1851, according to the said agreement, in manner and form as the plaintiff hath in that behalf alleged—to the country and issue.

21st plea, or 4th plea to the 3rd count—That the plaintiff was not able to procure the lease to the defendant of the said mill-privilege, &c., *modo et forma* alleged—to the country and issue.

22nd plea, or 5th plea to the 3rd count—That the plaintiff did not offer to procure the said lease of the said mill-privilege for the remainder of the said term of years *modo et forma* alleged—to the country.

23rd plea, or 6th plea to the 3rd count—That the defendant was ready and willing to perform all things on his part, and to accept a lease, &c., until the 18th of March 1851—but that the Navigation Company had not at the time the plaintiff accepted the defendant's offer, nor at any time before the said 18th of March, made the said lease to the defendant: verification.

24th plea, or 7th plea to the 3rd count—Fraud and covin.

25th plea, or 8th plea to the 3rd count—That it was mutually agreed to abandon the agreement before breach, &c.

Replication—similiter to the 19th, 20th, 21st and 22nd pleas: to the 23rd, that the plaintiff was not always until the 18th of March 1851, ready and willing, &c., on his part, *modo et forma*, and issue: to the 24th—denial of fraud, and issue: to the 25th—denial of rescision, and issue.

At the trial, the case proceeded upon the third count only.

Verdict for the defendant on the 1st and 2nd counts, and for the plaintiff on the 3rd count, on all the issues except the 19th and 20th. Damages assessed at £50. (a)

(a) See Owen v. Waters, 2 M. & W. 91, as to relation of the declaration; Fisher v. Ford 12 A. & E. 654; Allen v. Hopkins, 13 M. & W. 100, as to relation of the plea; Kemble v. Mills, 1 M. & G. 757; Giles v. Giles, 9 Q. B. 164, as to general averment of readiness, &c.

Read, as counsel for the plaintiff, obtained a rule upon the defendant to shew cause why the verdict on the issues found for the defendant should not be set aside, and the verdict entered thereon for the plaintiff; or why the plaintiff should not have judgment, notwithstanding the finding of the jury on these issues, or otherwise, as the court might direct.

Freeman shewed cause, and admitted the 19th plea, or the 2nd plea to the 3rd count, to be immaterial. He, however, contended that the verdict could not be changed, no leave being reserved; and that the 20th plea, or the 3rd plea to the 3rd count was material, and correctly found for the defendant, the plaintiff having failed to prove the payment of rent up to the 1st of January 1851, before action brought, but afterwards, through subsequent purchasers under the plaintiff, on the 7th of July 1851, which was between the issue of the writ and filing the declaration: that payment of the rent being alleged, was material to be proved: that without it the defendant was not bound to go on with the agreement, or to accept a lease; nor could the plaintiff sue the defendant for breach of contract while he was himself in default: that the plaintiff was to elect which of the defendant's offers he would accept, pay rent, and procure him a lease from the Grand River Navigation Company; and that, although he elected and might have obtained a lease, he did not pay rent as alleged: that such payment was not merely matter of collateral agreement, but was conditional, and a condition precedent or concurrent, and yet not performed—nor is readiness before action averred, if that would do: that the general allegation of performance would not override the special averment thereof, and which the plaintiff was bound to prove as alleged.

Read, in reply, contended that the payment of the water rent as alleged in the plea, did not bind the plaintiff to prove such payment before suit, but only before plea, the averment being "hath paid," which relates to the plea, not the commencement of the suit: that it was not conditional—and if it was, that it is good after the verdict upon other issues, none of which denied readiness, and readiness was alleged in the declaration, and in effect admitted, and was in

itself sufficient: that readiness and offer to perform on the plaintiff's part was enough, and actual payment unnecessary: that the defendant repudiated the contract and refused to go on, after which payment of back rent by the plaintiff was immaterial, especially as the lease was to be made from the Grand River Navigation Company to the defendant, under their agreement with the plaintiff, which lease the plaintiff shews he could have obtained, and which, if made, would not have been retrospective so as to embrace back rent; wherefore, neither the defendant nor the premises would be liable therefor if not paid; and it could be of no consequence to the defendant whether paid or not, except in so far as the Grand River Navigation Company might exact it before demising to the defendant, which was a matter between the plaintiff and them, and he proved his ability to procure the lease he had promised to the defendant.—He cited *Fisher v. Ford*, 12 A. & E. 654; *M'Intyre v. Miller*, 13 M. & W. 731; *Hitchcock v. Humphrey*, 6 Scott 540, 5 M. & G. 560; *Pim v. Grazebrook et al.*, 2 C. B. 429; *Negelen v. Mitchell*, 7 M. & W. 621; *Perry v. Richmond*, 6 U. C. R. 285; *Abraham and another v. The Great Western Railway Company*, 5 Am. Eng. R. 258; *Turner v. Collins*, 15 Jur. 177; *Britt v. Pashley et al.*, 1 Ex. R. 64.

That if on the whole it appeared the defendant had broken his contract, the plaintiff was entitled to recover.—*The Fishmongers' Company v. Robertson*, 5 M. & G. 197; *Mackintosh v. The Midland Counties Railway Company*, 14 M. & W. 548.

And the court may look at the evidence and other issues, to see if the one found for the defendant is material—*Gwyne v. Burnell et al.*, 6 Bing. N. C. 453.

That if not entitled to judgment *non obstante* or to change the verdict, yet a new trial may be granted or some other relief be afforded under the other portions of the rule—*Wallis v. Warren*, 4 Ex. R. 361.

MACAULAY, C. J.—If the meaning of the agreement is, that the plaintiff was to assign to the defendant his agreement with the Grand River Navigation Company, and that

the defendant was then to obtain a lease for the residue of the twenty-one years from the company, the payment of rent by the plaintiff up to the 1st of January 1851 would be material, and the plaintiff bound to pay it before, or concurrently with the defendant's assigning the mortgage, because in that event the plaintiff would be bound to enable the defendant to procure a lease unincumbered with back rent, and to pay it up in order that the company might not have it in their power to exact it of the defendant, or to refuse to execute a lease to him unless he paid it; but such does not appear to be the true construction of the contract, taking the whole agreement together, nor has the plaintiff so treated it. The *onus* of procuring a lease from the company was assumed by the plaintiff; and if so, if that be the correct construction the payment of rent up to the 1st of January 1851, would be of no consequence to the defendant if the plaintiff obtained a lease to him, bearing rent only from the 1st of January 1851. I do not think the plaintiff undertakes to pay the water rent up to the 1st of January 1851 on or before the 18th of March, but he merely agreed to pay it up to the 1st of January—the meaning of which is, that he engaged to pay the rent up to that day, so that the defendant should not be liable to pay back rent but only from the 1st of January 1851. It is merely an expression of the agreement or understanding that the plaintiff was to pay the rent up to the day mentioned, after which, of course, the defendant would become liable to pay it. In this light I do not regard it as a condition precedent or concurrent. If the plaintiff procured a lease from the company to the defendant, bearing rent only from 1st of January 1851, it was all he was bound to do, unless indeed, he ought (as authorising the company to make such lease,) also assign to the defendant his agreement with the company for the lease, touching which no objection has arisen. I do not, therefore, think the payment of the back rent material to have been averred, and consequently that the traverse of it raised an immaterial issue.

If the plaintiff procured a lease from the company, and it is alleged, and it is found on other issues that he was

able, and offered to do so, it could not entitle the defendant to reject such lease, and to refuse to go on with the contract—that the rent was not paid; that interposed no obstacle or impediment, and imposed no liability or incumbrance upon him. If the allegation was struck out of the declaration it would remain good; and averments of all having been done and offered, that was incumbent upon the plaintiff to entitle him to an assignment of the mortgage, would still appear—unless, as before observed, an assignment of his agreement for a lease of, and his interest in the mill-privilege, &c., should have been averred. The more substantial step was to obtain a lease from the company direct to the defendant, which might be possibly procured upon a surrender or cancellation of the agreement without its passing his assignment through the defendant; and the offer of such a lease, and the defendant's refusal to accept it, are averred, and found against the defendant.

With respect to the other issue found for the defendant, I am less satisfied. It was given up at the argument as clearly immaterial.

I think the plaintiff was bound to accept or elect one of the defendant's offers on or before the 18th of March, and if he did not, that the defendant was not bound to go on with the contract: that was conditional, and the plaintiff had no discretion to elect afterwards, without the defendant's assent, for the value of one or other of the things offered by the defendant to the plaintiff, or of the mill-privilege, &c., might have become very materially enhanced or diminished after the day, and if the plaintiff was not bound to it, there was no other limit to the exercise of his discretion to elect.—*Pordage v. Cole* (1 Saund 320), *Giles v. Giles*, (11 Jur. 83), *Dicker v. Jackson* (12 Jur. 541), *Wilks v. Smith* (10 M. & W. 855).

The averment of the plaintiff's acceptance of the offer of the assignment of the mortgage on the 18th of March 1851 being a material averment, the plea traversing it raised a material issue, if, as framed, it did traverse it. Had the verdict been for the plaintiff, doubtless it would be held good after verdict; and it would be intended that the plaintiff proved,

as he alleged, that he had in due time elected to accept the offer of the mortgage. The traverse however, is, that he did not accept the assignment of the mortgage before the time for so doing had expired, as the plaintiff had alleged; and the allegation is, that the plaintiff, before the time limited had expired, did accept one of the offers, to wit, the assignment of the mortgage. He does not say to wit, the offer of such assignment; and if it is equivalent to averring that before the time limited had expired he agreed to accept the assignment of the mortgage, it is a good, though informal traverse. My difficulty is, that I do not see how it can well be understood that the traverse (though an informal one,) denies anything more or anything less than what the plaintiff alleged—that is, that the plaintiff had accepted the offer of the assignment, or had agreed to accept the assignment. It cannot be intended that the plea alleges a refusal of the plaintiff to accept a deed of assignment transferring the mortgage—that would be performance on the defendant's part, and should be affirmatively pleaded—if not, it seems to me susceptible of no other construction than that in denying that the plaintiff accepted the assignment of the mortgage, it necessarily, in reference to the declaration and the averments therein contained, denied the alleged acceptance of the defendant's offer to assign it, and not the actual assignment thereof by him, the defendant—the non-assigning of which is the very gist of the action.—See *Simms v. Henderson* (11 Q. B. 1615, *Ib.* 1626-7), *Hunter v. Caldwell* (10 Q. B. 69, 70), *Thomas v. Fredericks* (10 Q. B. 775), 1 *Saund.* 228 (1).

A plea to be construed in that sense which will support it—*Harris v. Goodwin* (2 M. & G. 405), *Hill v. White et al.* (1 M. & G. 731), *Huntingtown v. Gardiner* (1 B. & C. 297, 301), *Fletcher et al. v. Poyson* (3 B. & C. 192), *Hobson et al. v. Middleton* (6 B. & C. 295, 302), *Hill v. White et al.* (1 M. & G. 731), *Stead v. Poyer et al.* (1 C. B. 787). However, my learned brothers think the plea traverses what is not alleged, and therefore that it is immaterial; and as it was given up at the trial and upon the argument, the plaintiff seems entitled to recover upon

the merits. I do not think I am called upon to investigate the point further, as it could only result either in a final difference of opinion from my learned brothers, or in a concurrence with them, and in either event the judgment would be for the plaintiff. Under such circumstances I do not think any good purpose could be served by suspending the decision till next term.

SULLIVAN, J.—The first question in this case is, whether the issues found for the defendant, and on pleas pleaded to the whole of the count, are, or whether either of them is, material. The first issue objected to is upon an averment in the 3rd count, that the plaintiff paid the water rent on the premises which he was to procure a lease for to the defendant up to the 1st January 1851. The plaintiff, as set forth in the count, was possessed of what he calls a mill privilege, under an agreement for a lease of twenty-one years with the Grand River Navigation Company; and his agreement was to dispose of his interest to the defendant: and that a lease should be made by the company; and that the plaintiff would pay the water rent up to the first day of January next before the making of the agreement. The plaintiff was to accept one of these offers of the defendant on or before the 18th March 1851. The plaintiff averred that he did, before the time limited, accept one of the offers of the defendant; and that he did pay the water rent up to the first January; and that he was ready, and willing, and able to procure the lease to the defendant, and offered to do so. Now, there was no time alleged by the plaintiff for his having paid the water rent, he did not say in his averment whether it had been paid before, or at, or after the time of his acceptance of the defendant's offer, or before, or at, or after the time of his (the plaintiff's) offer to procure the lease and his demand of the assignment of mortgage, which by the agreement he was to receive in return. If the payment of the water rent were a condition precedent to the offer to procure the lease and the demand of the assignment, and consequently to the accruing of the right of action, it is manifest that the meaning which should have been attached to the averment in the declaration at

the trial should have been that the water rent was paid by the plaintiff before he demanded of the defendant that he should perform his contract. If the payment were only a concurrent condition, then a readiness and willingness to pay the water rent up to the said 1st January was all that the plaintiff need have averred. He has not, at least in terms, averred this readiness and willingness; but he was at liberty to substitute for it an averment that he had paid it before or at the time of his demand upon the defendant to perform the agreement, and consequently before the cause of action arose, and a portion before action brought: a payment after action brought could not help him. A finding of the jury in the plaintiff's favor would therefore, though no time or order of common law were given in the averment, infer that the plaintiff had paid the rent before the offer to procure the lease upon which offer the cause of action arose. The jury found for the defendant, from which I would infer (as I happen to know from the evidence and my own charge, and the information given by the jury) that they found that the rent was not paid until after the alleged cause of action arose, or after action brought—in either of which cases the payment or non-payment would be a matter of perfect indifference to the defendant, or to the law or merits involved in this action. I think the finding of the jury a proper one: and if the fact of payment, or even of readiness to pay, before the cause of action could arise were necessary, then I think the issue and the verdict upon it material, because the plaintiff has not rested upon his readiness to pay, neither has he averred it specially or generally, and all he would have to rely upon would be the averment of actual payment.

According, however, to my construction of the agreement, this payment of rent due by the plaintiff was neither a condition precedent, nor to be concurrent in its performance with the defendant's performance. The agreement was that the plaintiff undertook that the company should make a lease for a period to commence after the 1st January 1851, supposing nothing said about the previous rent. It is plain that the defendant would not be liable to pay rent accrued

from another person before the commencement of his term, neither would a tender of a lease which made him so liable have been a fulfilment of the plaintiff's agreement. If the words in the agreement mean anything, they are a qualification of the plaintiff's undertaking, a kind of negative pregnant, shewing that it was understood that the whole current year from the first day of January might be reserved out of the premises in the lease to be granted by the company to the defendant. If the lease were procured in the terms of the agreement, nothing could be more indifferent to the defendant than the fact of payment or non-payment of the previous rent. It is in this light that I looked upon the understanding expressed in the agreement at the trial; but I felt then, that if upon consideration I should appear to have been wrong, that the real issue to be tried was whether the rent had or had not been paid before the alleged breach of the defendant's agreement. If it had not been paid before the commencement of the suit, it involved the negative of the proposition; and so in that shape I left it to the jury. I think now, upon full consideration of the agreement between the parties, as set out in the 3rd count, that the averment was unnecessary.

The other issue found for the defendant is upon a plea that the plaintiff did not accept the assignment of the mortgage in manner and form as the plaintiff in his third count had in that behalf alleged. The agreement declared upon required the acceptance of one of several offers by a certain day—i. e., the 18th of March. The declaration averred that the plaintiff did, on the 18th of March, accept one of the *said* offers—to wit, the assignment of the said mortgage. The averment is not correctly framed, it should have said—to wit, *the offer* of the said mortgage, but the meaning was very distinct. It is plain to be seen it was an offer that was alleged to be accepted. If the plaintiff were to be held to aver that he accepted the assignment, he would be alleging a performance on the part of the defendant. The latter in his plea, instead of taking the averment in its true meaning, puts a false construction upon it, and pleads a plea which is no answer

to the plaintiff's case, and in words which appear to me to leave no doubt upon the question. He says the plaintiff did not accept the said assignment. The issue found for him, if entered on a judgment roll, must be that the plaintiff did accept the assignment, which would be repugnant to the rest of the record. The only argument that can be alleged in favour of the issue is, that the words *modo et forma* refer to an averment in the declaration, and must be held to deny it in its true sense and meaning, whatever that might be, and that after verdict it may be taken to do so. There are many cases of equivocal words in pleading being construed after verdict so as to support the proceeding; for instance, the case of *Avery v. Hoole* (2 Cowp. 825), was an action of debt upon the game laws. The declaration stated "that the defendant *used* a gun, being an engine, to destroy and kill the game," without any other averment that the defendant so used the gun. The court held the ambiguity cured by the verdict, on the express ground that the judge must be supposed to have seen the offence proved within the statute, and as the words of the declaration were capable of that construction. In like manner in *Lord Huntingtown v. Gardiner* (1 B. & C. 297), the words "for giving" his note, were held after verdict to mean that the bribe was given to the voter "to give" his vote. In *Fletcher et al. v. Poyson* (3 B. & C. 192), it was alleged that plaintiffs were chosen as assignees of the estate and effects of the bankrupt, and afterwards mentioning them as assignees as aforesaid, was after verdict a sufficient allegation of an assignment. Holroyd, J., says, "there is a well known rule of law that where in pleading matter is stated capable of two constructions, and it is not demurred to, that construction may be given which supports, instead of defeats, the proceeding." *Hobson v. Middleton* (6 B. & C. 295) shews that a mere ambiguity in the word *whereby* as to its application to one of several acts, is cured by pleading over. The case of *Stennet v. Hogg* (1 Wm.'s Saund. 227-8), and the numerous cases cited in the notes, shew it to be clearly established in cases of omissions of averment in the declaration, which, if they had not been

omitted, were necessarily traversed and put in issue by the pleas upon the record, so that the judge must have required proof of facts at the trial, which would support the required statement if upon the record: that then the omissions or imperfect statements in the declaration are cured by the verdict, upon the presumption that all that was necessary to the plaintiff's case was proved at the trial, but I do not find any case which gives a plea a reference to a particular averment in the declaration, and makes the traverse of a fact not alleged to refer to one which is averred, the one which is averred being necessary to the plaintiff's case, but the one which is denied, unnecessary. If the defendant had in his pleas given the true meaning to the language of the present averment, and had traversed the acceptance of the offer of the assignment of the mortgage, upon which issue was joined, I can understand that this would cure any ambiguity of averment in the declaration, even if it were much more faulty than it is in this case; or if he had pleaded an insufficient plea, and a good issue were made by the replication, and a joinder upon it, so that the court could see that the important matter in the issue were tried, the plaintiff could not after verdict object to it—7 H. VII. 7, System of Pleading, p. 236. But if an immaterial issue is joined, that will not bring the matter in question before the jury. It is not helped by the Statute of Jeofails. A defect in pleading is aided if the adverse party plead over to, or answer the defective pleading in such manner that the omission or informality therein is expressly or impliedly supplied—1 Ch. Pl. 7 Ed. 703-4-5, et seq. Then, all the cases I have seen of defects aided by verdict are cases of omissions or imperfect statements on the part of the plaintiff, of matters of fact necessary to his case, and which facts some plea or pleas on the record necessarily put in issue by implication. When the verdict is for the plaintiff these facts are supposed to have been proved at the trial, but I cannot find any case in which a mere issue proved on a *plea* concluding to the country, and on the face of it immaterial, has, after verdict, been intended to be a

denial of some material fact averred in the declaration, which in terms it does not deny. When the verdict is for the plaintiff, and necessary statements put in issue, by pleas on the record, though omitted or imperfectly stated, there is a reason for supplying the omission, or construing the ambiguity favorably for the plaintiff, which fails altogether when the rule is attempted to be applied to an ambiguous or defective plea in the form of a traverse, for all that we see on the *postea* is that the issue was tried, and such as it was it was found for the defendant. The rule of supplying omissions after verdict would probably apply to affirmative pleading equally, as to declarations—for example, if a plea were to set out a feoffment by charter, omitting to allege livery of seizin, the court might possibly presume after verdict that livery of seizin was proved, but it is not necessary to support the finding of the jury on a plea purporting to be a simple denial, to intend anything. The jury find as it is; and if immaterial in its terms, I think it must be so adjudged. I may observe, that at the trial of this case my attention was not called to the words of the averment or the possibility of the construction of the plea, which would allow the thing itself to be held to mean the offer of it. In the multitude of issues for the first time presented to me, I found this one, and inquired what it was intended to mean. It was admitted to be immaterial, otherwise I might easily have left it to the jury to find specially that the offer *was* accepted. The finding of the jury upon other issues shews that this one would have been disposed of in favor of the plaintiff, and the evidence given at the trial is conclusive upon the point. I adopted the obvious meaning, so did the counsel and the jury; and if we were now to construe the word *assignment* to mean offer of assignment, we should, I think, by this forced construction make the findings of the jury contradictory, and on this issue directly opposed to the justice and the truth, and this I am not prepared to do. I do not think that the words *modo et forma* help the plea. If the averment in the declaration had been in the words of the plea it would have been bad on demurrer; but the plea

does not traverse the words of the declaration. If it can be referred to the averment in the 3rd count of an acceptance of the offer of the assignment, it perversely puts a meaning into the averment which was not, and could not have been intended, for the plaintiff has not averred in any manner; and from an acceptance by him of the assignment, I am of opinion that this issue found for the plaintiff is immaterial.

If both issues found for the defendant be immaterial, can there then be a judgment for the plaintiff *non obstante veredicto*? This is a question upon which I see much difficulty. *Goodburn v. Bowman* (9 Bing. 533, 42) brings up the point directly, though in that case not necessary to be decided. Tindal, C. J., gives the judgment of the court in these words—"We are of opinion, in the first place, that taking together the whole of the allegations in the respective pleas, they fully amount to a confession of the cause of action. But, if this point were doubtful, it may not be improper to observe that most of the cases in which the question respecting a repleader has been considered were before the statute of Anne, when only one plea could be put upon the record. If therefore such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied. In the present case there is a verdict upon the general issue, which finds that the defendant did publish the libels; and although, in considering the merit or demerit of any individual plea, recourse cannot be had to another unless expressly referred to in such plea, yet, as the application to enter the verdict is founded upon the whole record, upon which it appears that the defendant has committed the grievance complained of, and he has not shewn any sufficient justification, it may be considered that in that point of view there is enough to warrant the application for a judgment *non obstante veredicto*." This case is referred to in the judgment of the Court of Exchequer, delivered by Parke, B., in the case of *Plummer v. Lee* (2 M. & W. 500), as follows:—"In the case of *Goodburn v. Bowman*, it is for the first time suggested that if an immaterial issue be raised by one plea, and the cause of action is fully confessed or proved on

another upon the same record, the plaintiff is entitled to judgment on that confession or proof, and a repleader would not be awarded ; but the present case is distinguishable from that, for here no plea contains a confession of any part of the cause of action, and there is no issue upon any plea establishing the truth of the whole of it." It is to be noted that in *Plummer v. Lee*, an action on an award, there was a plea of no award, and probably the distinction between the general issue in the action for libel found for the plaintiff; the finding was considered by Parke, B., to establish the whole of the plaintiff's case, while in *Plummer v. Lee*, the action on the award, the fact of an award being made, found by the jury, did not establish all that was necessary for the plaintiff, and there being other facts necessary (as in the case before us,) to be alleged and proved ; but it will be found that *Plummer v. Lee* is not now considered as authority. Then comes the case of *Gwynne v. Burnell*, in error before the House of Lords, in which the fifth and seventh questions put to the judges severally are upon these points—fifth, supposing the verdict to be entered for the defendant on the said issue, and supposing it not to be a defence to the action that, &c., can the verdict be entered for the plaintiff *non obstante veredicto* ? and seventh, ought it to be a judgment for the plaintiff on the whole record, on the ground that the other pleas on the issues found thereon contain a sufficient confession, or afford sufficient proof whereon to found a judgment for the plaintiff, disregarding the material issue. In that case it appears to have been the opinion of judges, that upon a single plea, if the same were immaterial, and were not formally in confession and avoidance, judgment *non obstante veredicto* could not be entered. Baron Parke says, in answer to the fifth question, p. 528—"That which is traversable, and not traversed may be said, no doubt, to be admitted for some purpose—that is, it cannot be made a matter of dispute on the trial ; but there would be great difficulty in maintaining that this was a confession for the purpose of giving the plaintiff judgment. The effect of a traverse of one fact out of many is merely this, that

the party pleading rests his defence on a denial of that fact only ; but if the decision of it in favour of the defendant turns out to be immaterial, I conceive the court cannot give judgment as on a confession of other facts." In Baron Parke's answer to the seventh question he cites, with approval, the case of *Goodburn v. Bowman* (9 Bing. 532), and he says, "nor am I satisfied that the doctrine laid down by the Chief Justice (in *Goodburn v. Bowman*,) would not apply to a case in which the other issues, one or more, being each material and decisive of the whole cause of action, are each found for the plaintiff, although they did not severally or materially together traverse all the material facts alleged in the declaration, for it may be well said that a repleader is awarded to enable the parties to plead properly such a plea as would be decisive of the action ; and if they have already done so under the power given by the statute of Anne, and ruined one or more correct issues, such a course is unnecessary ; and I am disposed to think, after full consideration, that the Court of Exchequer was wrong in awarding a repleader in the case of *Plummer v. Lee*." Then, in *Hitchcock v. Humphrey* (5 M. & G. 560), judgment *non obstante veredicto* was granted where there was an immaterial issue found for the defendant, all the pleas being in denial without any confession. The issues found for the defendant were adjudged immaterial, because they traversed unnecessary averments in the plaintiff's declaration ; but of these averments they were, supposing the averments necessary, good and formal traverses. Then, in *Negelen v. Mitchell* (7 M. & W. 612), the same point is ruled, citing *Goodburn v. Bowman*, *Collins v. Gwynne*, and overruling *Plummer v. Lee*. In *Atkinson v. Davis* (11 M. & W. 236), this doctrine is not held to apply to the case of a replication which traverses a part of a plea, leaving as much unanswered as would form a good defence ; see also, *Lewin v. Edwards* (9 M. & W. 720), *Perry v. Richmond* (6 U. C. R. 285), *Turner v. Collins* (3 Am. Eng. Rep. 363, 15 Jur. 177 S. C.), further establishing the rule as regards an immaterial plea ; *Abraham v. The Great Northern Railway Company* (5 Am. Eng. Rep. 258, 20 L. J. N. S., Q. B. 322).

I have gone into the examination of this principle more than was necessary, but for the purpose of shewing the several steps by which it was established, and I think that there is no doubt but that if the two pleas, the issues upon which are found for the defendant, be insufficient, and the issues immaterial, there should be judgment *non obstante veredicto*, although all the pleas are in denial.

McLEAN, J. concurred.

Judgment for the plaintiff *non obstante veredicto*.

**BRUNSKILL V. METCALF AND FORBES, SURVIVING PARTNERS
OF ALEXANDER WILSON, DECEASED.**

Debtor and Creditor—Compositions—Requirements—Statute of Frauds.

Action on three several promissory notes. Defendants plead to the further maintenance of the action a composition with the plaintiff and other creditors, whereby "it was agreed by the defendants with the plaintiff and their other creditors, that after assigning a certain building contract to the Bank of Upper Canada, in discharge of the Bank claim against them, which was accepted, the defendants were to convey all their other estate, effects and contracts to two persons nominated in trust for the plaintiff and the other creditors; and that the plaintiff and the other creditors mutually agreed with each other, and with the defendants to accept the said conveyance as a composition, and in full satisfaction of their respective debts in full." Then followed an averment of readiness, &c., but that sufficient time had not been afforded before action; and also, an alleged agreement by the creditors not to proceed for the debts in the meantime. Issue joined by the plaintiff. The assignment, as completed after the commencement of the action, was executed by many creditors, but not by the plaintiff. The subject matter assigned appeared to have been goods, chattels and choses in action far exceeding 10*l.* in value, and yet, at the time of the composition pleaded, no part was delivered or accepted, no earnest paid, nor part payment made; nor was the agreement or composition pleaded in writing; and moreover, the Bank of Upper Canada, a corporation, one of the alleged parties to the agreement, did not appear to have contracted under their seal. *Held*, upon these grounds, that the plea was not supported, and a verdict found for the plaintiff at *Nisi Prius* was therefore not disturbed.

ASSUMPSIT. Writ issued 6th of March 1852. Declaration dated 16th of March 1852.

First count—against defendants as makers of a promissory note on the 23rd of September 1851, for 101*l.* 15*s.* 5*d.*, payable to the plaintiff, or order, four months after date.

Second count—as makers of another promissory note on the 10th of November 1851, for 131*l.* 16*s.* 7*d.*, payable to the plaintiff or order three months after date.

Third count—as makers of another promissory note on the 11th of November 1851, for 206*l.* 19*s.* 9*d.*, payable to plaintiff or order three months after date.

Plea—23rd March 1852—Against the further maintenance of the action, because, after making the promises in the declaration mentioned, and before, and up to, and until the commencement of this suit—to wit, up to and until the day of the date of suing out the plaintiff's writ in this cause—the defendants were indebted to the plaintiff in the sums of money in the declaration mentioned, and to divers other persons in large sums of money, and became, and were insolvent and unable to pay or satisfy the plaintiffs or the said other creditors of the defendants their debts in full, whereof the plaintiff and the said other creditors had notice ; and thereupon at a meeting of the defendants' creditors held, to wit, on the 20th of March 1852, at which the plaintiff was present, and concurred therein, it was agreed upon, by and between the plaintiff and the defendants' said other creditors and the defendants, that the defendants should assign to the Bank of Upper Canada, one of the defendants' aforesaid creditors, the contract for the erection and completion of the Cathedral Church in the city of Toronto, and the machinery and implements belonging thereto, and used therewith, in consideration of the said Bank discharging these defendants from all liabilities under the defendants' contract to build and complete the said church, and from a large sum of money, to wit, 1450*l.*, due and owing from the defendants to the said Bank ; and further, that the sureties of the defendants for the completion of the contract by the defendants should be discharged from their liabilities, all of which the said Bank *agreed* to and *accepted*, and of which the plaintiff and the other creditors had notice, and to which they assented and agreed, and thereupon the defendants "agreed to, and with the plaintiff and their other creditors, to make and execute a conveyance of all their *other estate* and effects and contracts" (other than the said church) "to George Bilton and James Leishman," two of the defendants' creditors, as assignees of the said last mentioned estate, and in trust for the benefit of the plaintiff and the defendants' other creditors aforesaid, and to pay the proceeds arising and realized from the said trust to the plaintiff and the said other

creditors *pari passu*, share and share alike : that the defendants were to devote such of their time, skill, industry and services, as the said assignees might from time to time require towards the full completion of the said contracts, and that the plaintiff and the defendants' other creditors should discharge the defendants' from their liabilities, which the plaintiff and the said other creditors respectively had against and upon the defendants ; and thereupon the plaintiff and the said other creditors mutually "agreed with each other, and with the defendants, to accept and take the said conveyance of the said estate, and as aforesaid, as a composition for, and in full satisfaction of, their said respective debts in full ;" and the defendants averred that they were ready and willing to make and execute such a conveyance as would carry out the said arrangements, and that sufficient time had not yet been afforded to them to make and perfect the same, and to carry out the said agreement, from the time of the making of the said agreement, to wit, the 20th of March 1852, up to, and until the making of the said plea ; and that no conveyance, deed, or other instrument had been offered or tendered to them for execution, to carry out the said agreement between the said plaintiff and the defendants' other creditors and the defendants ; and the defendants averred "that in the meantime the plaintiff and the said other creditors of the defendants were not, nor was any of them to proceed against the defendants for the recovery of their respective debts ;" and that the said other creditors of the defendants have refrained from taking any proceedings at law, to recover judgment for their demands and claims upon the defendants, in good faith, and under the belief that the plaintiff would carry out the said agreement for the equal distribution of the entire estate and assets of the defendants amongst the plaintiff and the said other creditors of the defendants, ratably as aforesaid. Verification, and prayed judgment whether the plaintiff ought further to maintain his aforesaid action. .

Replication, 26th of March 1852—*Precludi non*, &c., because he says that the plaintiff and the said other creditors did not mutually agree with each other, and with the

defendants, to accept or take the conveyance therein mentioned, as a composition for, and in satisfaction of their said respective debts; nor was it agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt, in manner and form as the defendants have above alleged. To the country and issue.

At the trial of this case, before Mr. Justice Burns, at the last Toronto assizes, the defendant was allowed to begin, and the only witness examined was Thomas Bilton, who said he was a creditor of the defendants: that the defendants having got into difficulty, several meetings of their creditors were held in March last, in the city of Toronto: that at the first meeting 50 or 60 creditors attended, when a chairman (Mr. Lee) and secretary were chosen, the plaintiff being secretary, at which the defendants submitted a statement of their affairs, and a committee was chosen to investigate the same, the plaintiff being one, and the witness another: that after several meetings of the committee, including the plaintiff, it was arranged that the contract for erecting a cathedral in the city of Toronto should be given up to the Bank of Upper Canada, and that the remainder should be conducted by assignees, for the benefit of the creditors: that the plaintiff wished to be sole assignee, but it was not assented to: that a meeting was held to choose assignees, at which the plaintiff was present: that while the body of creditors were choosing assignees the plaintiff went out of the room, taking with him certain resolutions that had been prepared: that the witness thought he would return, but he did not. At this stage of the case the defendants' counsel proposed to prove an arrangement which the creditors came to with the defendants and the plaintiff, in reference to closing the business of the defendants, and realizing the debts of the firm, and distribution of the assets, verbally and orally at the meeting with chairman and secretary, when certain resolutions were prepared and carried, which the plaintiff took away, but nothing being signed by the plaintiff: that a deed of composition was afterwards prepared, and the creditors signed it,

but the plaintiff did not. The learned judge ruled that the agreement set forth in the plea should have been in writing, and that it was necessary to prove it signed by the plaintiff, shewing that he did enter into such composition, and that the effect of the promissory notes could not be controlled by the verbal agreement or arrangement.

The witness then proceeded to state that the deed produced embodied the agreement and arrangement which the meeting came to, as he believed; and that the bank afterwards took and accepted the cathedral contract. On cross-examination, he said the resolutions were proposed by different members of the meeting: that Mr. Lee was chairman, and that the papers shewn were on the table when the plaintiff left the meeting: that the result was the choice of two assignees after the plaintiff went away: that the contents of the resolutions he could not recollect: that the plaintiff had drawn up the report submitted to the other creditors, and adopted at the meeting: that one Leishman was chosen assignee, but he refused to act, and never signed the deed or came in under the composition: that one Haworth, a creditor, would not come in under it, and that many of the propositions stated in the deed, and many things contained therein were not discussed or mentioned at the meeting, nor in the plaintiff's presence—such as a power to change the assignees, and the liability of the creditors in completing the contracts, were not discussed: that it was resolved the creditors should come in and sign within fourteen days, or be excluded the benefit of the contracts: that he believed Leishman refused to come in because of the liability the creditors might incur in completing the contract: that the creditors might sustain a loss on the completion of the contracts: that the other resolutions, except the two produced were taken away by the plaintiff: that he had frequently applied to him for them, but had not been able to obtain them.

The case seemed to have been rested, or to have stopped here; and the learned judge ruled that the plea was not proved for want of a written agreement to bind the plaintiff to control the legal effect of the promissory notes,

MACAULAY, C. J.—Composition arrangements seem to be pleadable in bar to actions by one of the creditors, party thereto, against the debtor, when—

1st. The agreement has been executed, so as to form a completely executed accord and satisfaction, or where the instrument is under seal, and releases the debt, or contains a provision that the debt shall be released if the plaintiff molests the debtor (the defendant), which molestation would be shewn by the bringing of the action—*Gibbons v. Vouillon* (14 Jur. 66, 8 C. B. 483, 7 D. & L. 266), *Ex parte Bateson* (1 M. D. & De Gex. 289), 2 Saund. 137, i.

2nd. Or when it is pleaded and (if traversed) proved that the agreement for the composition or *cessio bonorum*, if still executory, was in itself accepted in satisfaction of the pre-existing debts, the promise to assign, and not the actual assignment, being the consideration—*Good v. Cheeseman* (2 B. & Ad. 328), as explained by Parke, B., in *Evans v. Powis* (1 Ex. R. 607), and by Tindal, C. J., in same case (11 Jur. 1048), and see *Alchin v. Hopkins* (1 Bing. N. C. 99, 102), and *Bayley v. Hornan* (3 Bing. N. C. 915), 2 Saund. 137, i.

3rd. Or, that the agreement mutually bound the parties not to sue, which would extinguish the old debt, unless the defendant's subsequent breach of the agreement on his part remitted the creditors to their former rights, and entitled them to put an end to the agreement for a composition.—*Ford v. Beech* (12 Jur. 310, 17 L. J. Q. B. 114, S. C., 5 D. & L. 610, S. C., 11 Q. B. 842, S. C.), *Gibbon v. Vouillon* (14 Jur. 66), *Reny v. Richardson* (2 C. M. & R. 425): that fraud or default on the debtor's part should be replied.

4th. Or it may be upon the further ground, that for one creditor to attempt enforcing his demand against the debtor after entering into an agreement for a composition, either executed or executory, although it would be a question how far such fraud can very well be set up as a defence by the debtor, unless it is equally a fraud or collusion between themselves, or when it amounts to more as to the other creditors than a mere breach of contract, and only so far fraudulent, as all breaches of agreement are so—

Greenwood v. Lidbetter (12 Price 189): that it is rather fraud in equity—*Cooper v. Phillips* (1 C. M. & R. 649, 3 Dow. 196), *Viner v. Mitchell* (1 M. & Rob. 337).

Now, here it is not pleaded that the agreement to assign was executed. Indeed, the plea is to the further maintenance of the suit, although it does not allege the agreement to have been since action brought, or shew it otherwise than by the date of the making thereof laid under a *videlicet*; nor is it stated to have been under hand and seal, or even in writing; nor is it pleaded that the agreement or promise to assign was accepted in satisfaction of the existing debts; it merely alleges that the plaintiff and the other creditors agreed with each other, and with the defendants, to accept and take the conveyance of their estate as aforesaid a composition for, and in full satisfaction of their respective debts in full. It does, however, aver (not alleging that it was expressly so agreed,) that in the meantime the plaintiff and the said other creditors of the defendants were not, nor were any of them, to proceed against the defendants for the recovery of their respective debts. The plaintiff traverses the allegations that he and the said other creditors did mutually agree with each other and with the defendants, to accept or take the conveyance therein mentioned as a composition for and in satisfaction of their respective debts; or that it was agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt in manner and form by the defendants alleged. The conveyance mentioned was a conveyance from the defendants of their other estate and effects and contracts (other than the contract therein mentioned for the erection and completion of the cathedral church in the city of Toronto, &c., which the Bank of Upper Canada had agreed to, and accepted in satisfaction of certain demands of theirs, and upon certain terms specified), unto George Bilton and James Leishman two of the defendants' creditors, as assignees of the said estate, &c., in trust for the benefit of the plaintiff and the defendants' other creditors aforesaid, and to pay the proceeds arising and realized from the said trust to the

plaintiff and the said other creditors *pari passu*, share and share alike : the defendants to devote such of their time, skill, industry and services, as the said assignees might from time to time require towards the full completion of the said contracts, and the plaintiff and the defendants' other creditors to discharge the defendants from their liabilities which he and they respectively had against the defendants. Then follows the allegation of mutual and reciprocal promises. The alleged forbearance of suits in the meantime is inserted afterwards, and is not stated distinctly as a part of the agreement previously mentioned, and would probably be no bar without it.

The question is, whether the agreement is proved as laid.

It is manifestly not a simple ordinary transaction of a composition for so much in the pound, or of a *cessio bonorum* in satisfaction ; nor does the agreement state with certainty what the subject matter of the intended assignment was to consist of. It speaks of all the defendants' estate, effects and contracts, importing some of each, but not particularizing anything of either ; and when this case was tried formerly in the county court no explanatory evidence was given on that head.—See the elaborate judgment of Mr. Justice Sullivan (a). On the last trial an assignment executed since the alleged agreement, and bearing date the 12th of April 1852, was produced, and apparently admitted without proof. It is under the hands and seals of the defendants ; and though executed since the plea pleaded, I think it thus far material in the present case, that it not only shews what the subject matter to be assigned consisted of, but also upon what terms, and to whom, according to the declaration of the defendants, under hand and seal. Upon looking into it, and to the schedules annexed, it shews that the estate, effects and contracts of the defendants consisted of certain goods and chattels, and of certain special building contracts.

Without going further, it appears to me the ruling of the

(a) 2 U. C. C. P. 450.

learned judge was correct, though not on the ground stated by him : that such agreements between creditors and their debtor may be by parol (meaning thereby, made orally), there is authority to shew. It was so made according to the special verdict in *Norman v. Thompson* (4 Ex. R. 757).

But if the property to be assigned is such that an executory agreement in respect thereof is by the Statute of Frauds required to be in writing, and signed by the party to be charged therewith, I find no authority for treating composition agreements as differing, or upon any other footing than other agreements for the sale and purchase of such property as respected mere choses in action or contracts that in law cannot be assigned so as to substitute the vendee in the place of the vendor—as in building contracts—however such an assignment or an agreement therefor may in law constitute a valid consideration for anything undertaken and agreed to be done by the other party. Still, if the subject is an interest in real estate, or goods exceeding 10*l.* in value, or for something not to be performed within a year, it seems essential to be proved by a written note or memorandum when set up and relied upon in support of an action, or by plea, as a good subsisting agreement against an action.—In *Alchin v. Hopkins* (1 Bing. N. C. 102), Tindal, C. J. (speaking of the agreement in that case), said “it appeared that it was never signed by the defendant. In case therefore the creditors should sue upon it they would be met by the preliminary objection that a contract for the profits of a living, &c., was for an interest in, or concerning lands, &c., and that no action would lie upon it as it had not been signed by the defendant, or by any person by him thereunto lawfully authorised”—wherefore he held the proof insufficient: “for,” he said, “the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement by mutual consent, and on good consideration, in the stead or place of the old contract, which was the point established by the case of *Good v. Cheeseman*. The new or substituted agreement must therefore of necessity

be one which is legal and valid, &c.”—In *Emmet v. Dewhirst* (15 Jurist 1115), Lord Chancellor (Truro) held the agreement within the Statute of Frauds, and that it must be in writing; and see also, *Barber v. Fox* (2 Saund. 137 *h. i.*), *Laythorp v. Bryant* (2 Bing. N. C. 735).

Now, we cannot but see that in this case goods far exceeding 10*l.* in value were to be assigned, and yet no part was delivered or accepted; no earnest was paid, or part payment made; nor was the agreement in writing signed by the plaintiff or the defendants; and moreover, the Bank of Upper Canada could only be bound by an agreement under seal, if they could bind the corporation at all, and if the traverse of the plea leaves the allegations as to them uncontradicted, and therefore *pro hac vice* admitted, which is by no means clear to me. The Bank of Upper Canada was clearly a party to that part of the agreement for a conveyance which is traversed, and would not be bound without their seal; and if only some of the creditors were bound, the proof would fall short of the defendants’ allegation—See *Fishmongers’ Company v. Robertson* (5 M. & G. 197), *Arnold v. The Mayor of Poole* (4 M. & G. 895). Upon the ground therefore of the want of written proof, I think the defendants failed to support the plea—*Carrington v. Roots* (2 M. & W. 254).

Nothing signed by either the plaintiff or the defendants in the form of a matured agreement is suggested to have existed; and even if the chairman of the meeting could be regarded as the agent for all parties, as very probably he might, still the only paper signed by him is the second resolution above stated, dated the 20th of March 1852; and it does not contain all the terms of agreement as alleged in the plea, but does contain other material matters not stated in the plea, such as that fourteen days only from the date of the assignment were to be allowed to the creditors to come in and execute the deed, &c. The first resolution is not signed at all, and only mentions one trustee.

It appears to me the agreement was inchoate when the plaintiff left the last meeting. The special terms embodied in the subsequent indenture of assignment shew that; and

if it speaks what the defendants contend was agreed, it varies in many particulars from that which is stated in the plea; and, considering the responsibility to be incurred if the creditors were to adopt the execution of the unperformed building contract, and to indemnify the trustees from loss therein, it seems to me the terms should have been more distinctly expressed and understood than they seem to have been on the occasion in question. Mere overtures for an agreement, or going half way in one and then receding, will not do. And if the plaintiff is to be told that he is bound to become a party to the indenture shewn, or to stand barred, no sufficient evidence has been given or been alleged to exist that appears to me to bind him to anything so stringent.

It is said the plaintiff acted the part of spoliator, and that every presumption should be against him as respects the contents of the papers he took away and has suppressed or destroyed. I do not think anything suggested to have been in these papers would amount to a sufficient written agreement, signed by the parties, or either of them—the report or proposals of the committee would not, for it was a matter of suggestion or proposal, not of agreement; nor would the resolutions alleged to have been abstracted, unless signed, and it is not asserted or proved that they were. But, stopping here, it must be contended the plaintiff had no *locus etands*, for if he had, before the trustees had been fixed upon, his sudden departure without explanation, considering his previous desire to have been one, if not the sole assignee, seems to afford cogent proof that, so far from agreeing finally to the arrangement, he abandoned it before it was matured, unless indeed, as contended, he had delegated to the meeting at large authority to act for, and bind him in whatever more was to be done, and especially in the appointment of trustees, a fact of which I see no proof. Moreover, it would seem that Mr. Leishman did not agree to become trustee, and had not become one, and still the plea alleges that he and the other creditors agreed that he should. The proof is not clear whether he dissented at the meeting, or assented there and dissented

afterwards, but there is no distinct evidence that he ever assented at all.

Then, it is said the learned judge rejected or refused oral proof of such assent, and of the agreement generally, and of the plaintiff's acquiescence therein. I do not find that he rejected any evidence offered, and the note at the end of the case imports that the defendants' counsel considered he was entitled to go to the jury on the case he had made, rather than that he was ready and prepared to give more evidence, and only refrained because of the ruling of the learned judge. None actually offered was refused; and upon the evidence given for all that could be according to the suggestions of the defendants' counsel, I think the case did fail, and must have failed, for want of adequate written proof.

The case would also fail on another ground. The plea in effect alleges that all the defendants' creditors were parties to the arrangement; and that all except the Bank of Upper Canada were parties to, and concurred in the conveyance therein mentioned, whereas there is no proof of such universal concurrence; and, though few in number of the defendants' creditors, who up to the time of the last trial, but had executed and become parties to the assignment, seems to shew that the agreement was by no means general—See *Brown v. Dakeyne* (11 Jur. 39), *Norman v. Thompson* (4 Ex. R. 755), *Barber v. Fox* (2 Saund. 137 *h. i.*)

I may further remark that the provision for excluding all creditors who did not execute within fourteen days may be taken to imply that those who declined were to be left in *statu quo*, unless it applied only to those creditors not parties to the agreement of the 20th of March, and if that was intended it is not so expressed.

However, therefore, I regret the disappointment to the defendants in an expected composition, and final and full discharge, I do not think the evidence goes far enough to hold the plaintiff to it. His withdrawal and refusal preceded the assignment; consequently neither the defendants nor their other creditors could have become parties to the actual assignment when made, relying upon the plaintiff's being a party, or induced by his having agreed to become

one. His replication denying the agreement is dated the 26th of March, and the plea to which it is a reply is dated the 23rd of that month, and the indenture not then made, bears date the 12th of April following; and the defendants appear still to stand in relation to many other creditors, and some for larger sums, in the same situation as they do towards the plaintiff. The assignment would most likely be unimpeachable as void against these non-executing creditors; and if, by refraining from coming in under it, they have lost recourse against the assets assigned, or the benefit of arrangement, it is their own fault, if they had notice and declined advisedly. It is not alleged or proved that the plaintiff had notice of the appointment of assignees and trustees, if that, under the circumstances, were material.—*Coate v. Williams* (21 L. J. Ex. 176). And there is really no evidence of the alleged agreement to stay proceedings, without which the plaintiff would not on this plea be restrained. I think, on the whole therefore, that the rule should be discharged, however hard it may operate upon the defendants.

SULLIVAN, J.—The judgment I gave in this case when before us on the motion to set aside the verdict given in the county court under the writ of trial, (a) would shew that, in my opinion, the production of such a deed of assignment from the defendants as was shewn at the last trial, as containing the substance of the parol agreement said to have been entered into between the creditors and the defendants previously, would have conclusively left the defendants without defence on the issue joined. On the former trial it did not appear at all what was the subject of the assignment agreed upon; now it appears by the schedule that goods and chattels to a large amount formed part of the assets to be assigned: this would prevent the agreement from being valid under the Statute of Frauds. Again: it appears now, that a corporate body—namely, the Bank of Upper Canada—were one of the parties to the very agreement traversed; this they could not be unless the

(a) 2 U. C. C. P. 450.

contrast was under seal. The want of such proof mainly caused me to agree to the setting aside the verdict in favour of the defendants, but now I think these are objections which the defendants could not have got over by any other evidence.

I do not agree with the reasons given by Mr. Justice Burns, for requiring an agreement in writing, but I think there were other abundant reasons for requiring a written agreement. The agreement in the deed produced, that the corporate bodies mentioned therein should be bound by the execution of the deed by any director or officer, without the corporate seal, might have been good in an act of parliament, but I do not see how a corporation by parol, or by an instrument not under the corporate seal, can agree to be bound. It is strange that in this case there is not a word of evidence to shew an agreement to forbear to sue, which is the very gist of the defence.

Mr. Crooks says that he was prevented from adducing further parol evidence by the ruling of the learned judge; but it does not appear by the notes of Mr. Justice Burns that he repeated any evidence, and the case proceeded, notwithstanding the expression of opinion on the part of Mr. Justice Burns, and Mr. Crooks insisted upon the case going to the jury upon parol testimony given, which, if it had so been left, there must inevitably have been a verdict for the plaintiff.

MOLMAN, J., concurred.

Rule discharged.

BARKERVILLE ET UX. V. CORBETT.

Action by husband and wife for monies lent and services rendered by wife dum solo—Declaration.

Assumpsit by husband and wife. Declaration—1st count, "That the defendant was indebted to the plaintiff's wife, while sole and unmarried, in £200, for wages as a hired servant: in £200 for money lent by her: in £200 for money paid by her for him: in £200 for money received by him for her, and in £200 on an account stated," in consideration whereof the defendant promised to pay her, &c., (*while she was sole and unmarried*), on request, &c., yet, &c. Pleas—1st, non-assumpsit—2nd, *actio non accrevit infra sex annos*, with two other pleas. It appeared in evidence that the plaintiff's wife *dum solo*, had lent the defendant some money, when to be returned not clearly appearing; and it further appeared that she, *dum solo*, had worked for the defendant well and faithfully, for three years. There was also evidence of admitted liability by the defendant within six years. The jury gave a verdict for £25, but it was not distinctly stated whether for wages or the money lent. The court refused to disturb this verdict, it being in accordance with the justice of the case, and it was said that the addition of another count would obviate all difficulty in the case.

Assumpsit by husband and wife.

Writ issued 7th of September 1852. Declaration of 18th of September, 1852.

1st count—That while sole and unmarried the defendant was indebted to the plaintiff's wife in £200 for wages as a hired servant, &c., and in £200 for money lent by her to him, and in £200 for money paid by her for him, and in £200 for money received by him for her, and in £200 found to be due from the defendant to her on an account stated between them, in consideration whereof the defendant (*while she was sole and unmarried*) promised to pay her the same on request; yet he hath not paid the said several monies, to plaintiff's damage of £200. It did not deny payment to the plaintiff Anne while sole, or to her and her husband John since marriage.

Pleas, of 28th of September 1852—

1st. Non-assumpsit, in manner and form alleged.

2nd. Set-off for monies due by the plaintiffs to the defendant at the commencement of the suit.

3rd. Payment to Anne, while sole and unmarried.

4th. That the said several causes of action in the declaration mentioned did not accrue to the said Anne at any time within six years next before suit, &c.

Replication, of 29th of September 1852, to second plea—
Plaintiffs' not indebted *modo et forma*.

To third plea—That the defendant did not pay Anne while sole, &c.

To 4th plea—That the said several causes of action in the declaration mentioned, and each of them, did accrue to the said Anne within six years next before the commencement of this suit, &c.

Verdict for the plaintiff's, £25.

It appeared in evidence at the trial, before Mr. Justice Burns, at the last Toronto assizes, that the plaintiff's wife was a sister of the defendant's : that the defendant lived in North Gwillimbury, and that at one time four unmarried sisters lived with him in his family, the plaintiff's wife being one : that *seven* years ago the plaintiff's wife (then being sole), lent the defendant £125 (\$500), to assist him in purchasing and paying for a lot of land : that this money belonged to the four sisters : that she wanted a promissory note for it, but that was deferred till after the land was bought, and it never was given. When the money was to be repaid, whether on request or as soon as the defendant could, or as soon as a mortgage given for the balance was paid off, was not clear, and nothing was said of interest in the meantime. There was evidence that the defendant had said the sisters had £50 a-piece, and he had been seen at different times getting money from them, on one occasion to pay for a pair of colts, and that he had said he would pay cash to his sisters, £25 each, as soon as he had the mortgage lifted, and that he had paid the husband of another sister some on her account.

Another witness said the money was to be repaid when the farm was paid for.

There was evidence by the assignee of the mortgage that the balance due thereon had been satisfied, and by Mr. John Duggan, his attorney, that the mortgage had been settled, and that he had instructions to return it, but that he did not know the settlement had been made for the defendant in any way, nor was the mortgage spoken of produced or proved at the trial.

There was also evidence that the defendant had said two months ago that he had paid all the money for the farm on the mortgage.

There was likewise evidence that the plaintiff's wife *dum sola* had worked for the defendant well and faithfully for as much as three years, and that £3 15s. a month wages would have been a reasonable reward for her services.

No witnesses were called for the defendant, but his counsel objected—1st : That the money had been borrowed more than six years before action brought ; and if no time was fixed for repayment, the Statute of Limitations commenced to run forthwith, and the demand was outlawed. 2ndly : Or if it was to be repaid as soon as the defendant was able, or as soon as the farm was paid for, the declaration was not adapted to the evidence, the farm not being paid for till after the marriage of the plaintiffs, and no promise to pay the plaintiffs after marriage was alleged, nor was there any promise alleged in the declaration to Anne, when sole, to pay her when able, or when the farm was paid for.

The plaintiffs' counsel only went for £25 of the borrowed money. The learned judge, however, left it to the jury to consider the claim for wages as to two of the three years, at all events, assuming one of the three to be more than six years before action brought, but strongly remarking upon the position of the parties, and the absence of any agreement for wages.

As to the money lent, that was also left to the jury upon the first point, viz., to fix the time when the money was to be repaid, and he reserved the second point in the event of the jury finding that the money was to be repaid as soon as the defendant was able or his farm was paid for.

The jury found for the plaintiff, £25, subject to the opinion of the court, which would seem to imply that they found the money was to be repaid when the farm was paid for, or when the defendant was able, treating that as proof of such ability ; but it was not distinctly stated whether the verdict was for wages or money lent ; and, if for money lent, whether

in the opinion of the jury it was lent, payable on request, or when the farm was paid for.

Wilson, Q. C., for the defendant, obtained a rule on the plaintiffs to shew cause why the verdict should not be set aside and a non-suit entered, or a new trial be granted, as the verdict was against law and evidence, and on the points reserved.

Price shewed cause, and contended—

1st. That the money was lent generally, and sufficiently acknowledged within six years. 2nd. That if upon credit, general indebitatus assumpsit would lie after its expiration—*James v. Cotton*, 7 Bing. 266. That if lent on credit it was not lent indefinitely, but to be repaid when the farm was paid for, and it was paid for before action brought. If the defendant was indebted on any ground it was sufficient—*Knowles et al. v. Michel et al.*, 13 East. 249.

Wilson, Q. C., in reply, contended it was not shewn that the defendant had yet paid up the mortgage: that one O'Donoghue, and not the defendant, paid it to or through Mr. Duggan: that it was a good test of the promise laid, whether the plaintiff's wife must have joined, or whether the husband could sue alone, and that for a debt due to her *dum sola* it was necessary for her to be paid: that they might join, and had joined—*Milner et al. v. Milnes and others*, 3 T. R. 627; *Littlefield v. Shee*, 2 B. & Adol. 811; *Sherrington v. Yates and others*, 12 M. & W. 855; *Yates and others v. Sherrington*, 11 M. & W. 102; *Grissell v. Robinson*, 3 Bing. N. C. 10; *Lucas v. Godwin*, Ib. 757. He gave up the objection that the declaration should be special on the agreement, but contended that the cause of action did not accrue till after the marriage of the plaintiffs, and therefore that the promise should have been laid to both: that if it accrued when the money was lent, it was outlawed: if when the farm was paid for, the event did not occur till after marriage, which was admitted to have taken place two years ago, and the mortgage paid off within one year last past: that the action accrued to both, and the promise should have been so laid, and not to her alone: that the declaration should have stated the money to have been

lent by her *dum sola*, and then alleged a promise to pay both since their marriage : that it was like a promissory note to her *dum sola*, coming due after her marriage—Pittam v. Foster and others, 1 B. & C. 248 ; Cowper et al. v. Goodmand, 9 Bing. 748 ; Huggins v. Coates, 5 Q. B. 432 ; Helps et al. v. Winterbottom, 2 B. & Adol. 431 ; Waters v. The Earl of Thanet, 2 Q. B. 757 ; Holmes v. Kerrison, 2 Taunt. 323 ; Irving et al. v. Veitch, 3 M. & W. 90 ; Paul v. Dod & Holmes, 2 C. B. 800. That the action accrued after marriage, wherefore the promise to her *dum sola* was not sustained.

MACAULAY, C. J.—The addition of another count might have obviated all difficulty in this case. If the verdict was for wages the present one would embrace it ; but, assuming the verdict to have been rendered for the money lent only, the plaintiffs may maintain it if they are in any aspect of the case under the evidence legally entitled to recover. Such I take to have been the intention of the learned judge and the jury at the trial, when the verdict was rendered subject to the opinion of the court. In *Stone v. Rogers* (2 M. & W. 447) Parke, B., said, “the question comes before the court in consequence of the point reserved, but not exactly in the way in which it was presented by that reservation ; however, the point having been reserved, we may deal with the whole case, and see whether under all the circumstances the plaintiff is entitled to recover.” The case is first to be considered under the plea of non-assumpsit, and secondly under that of the Statute of Limitations.

1st. Under the plea of non-assumpsit the question is, whether the money was lent generally, without any specific credit agreed upon at the time, or upon credit, such credit being made a condition, or part of the consideration in the defendant's borrowing and the plaintiff's lending it, and if so, when the credit was to expire. If lent, not expressly upon credit, the law would imply a promise to pay upon request, and the Statute of Limitations would begin to run forthwith—*Pott v. Clegg* (16 M. & W. 321). If lent on credit, the statute would not begin to run till such credit expired. If the money was lent generally, of course the

law implied a promise to pay the plaintiff *dum solv*, as alleged in the declaration; and although the weight of evidence tends to shew the money to have been lent upon a credit, to be paid when the farm (about to be purchased) was fully paid for, or when the mortgage to be given for the balance was satisfied; still if it was lent on credit, to be secured by a promissory note when the purchase of the farm was effected, and the defendant afterwards refused to give it (of which refusal, delay and the grounds taken upon the defence in this case might be evidence) the plaintiff would become entitled to sue for money lent, forthwith upon such refusal, as upon a promise to pay on request; and such refusal may not have been six years before action brought—*Bristowe v. Needham* (9. M. & W. 729). If in any point of view the money could be regarded as payable on request, before marriage, the declaration is supported; and if such promise was more than six years before action, there is evidence whence acknowledgments might be inferred implying liability to pay, and from which a promise to pay might be inferred within six years, and yet before marriage—*Beard v. Ketchum* (5 U. C. R. 114, 6 U. C. R. 470, 485); *Taylor Ev. sec. 784*.

2nd. But, if the money was lent to be repaid only when the farm was paid for, or the mortgage satisfied, then, unless it was an agreement not to be performed within a year, and so requiring to be proved by a written note or memorandum, according to the Statute of Frauds, 29 Car. II. ch. 3, sec. 4; or if it was—if the statute does not apply by reason of the agreement to lend being executed on the plaintiff's part, though not the agreement to pay on the defendant's, or if the payment was to be upon a contingency that might happen within a year—then the action did not accrue till within six years, and the Statute of Limitations is out of the question. But then it is said, that if so, the *promise* was *special* and express to pay at a future period, upon a contingency, and not one implied by law, to pay upon request, and in that event that the only promise to pay upon request must have arisen after the credit expired, and when the plaintiff (Anne) was married,

wherefore the promise laid in the declaration as made to her when sole and unmarried is not supported, or proved as alleged, and there is no doubt a question of difficulty thus arising.

Upon the whole, however, I am disposed to uphold the verdict ; on whatever terms lent, the money was lent by the wife *dam sola*. The debt was a chose in action belonging to her at and after her marriage, whether payable *in presenti* or not. Had the husband died it would have survived to her. He had not reduced it into possession, so as to make it a part of his assets or estate, nor does the bringing of this action do so, unless it goes on to execution. He is, however, joined in this action for necessary conformity, and sues as a plaintiff in right of his wife who is properly made a co-plaintiff, and retains the right to the debt if she survives him.

The consideration having moved from her, and she being the legal owner of the debt when it became due, and there being no express promise proved by the defendant to pay her or her husband, or both, after it became payable ; and yet, if after becoming so payable she could if a *feme sole*, have sued as for money lent, payable on request ; or if she and her husband could do so as matters are (and the contrary is not contended, that I understand), it follows, that the only promise to pay on request must be one implied by law as resulting from a debt for money lent, due, and payable at a day past, and so now due on request. Now, if so, the law in implying a promise to pay on request (which request when implied is sufficiently made by bringing an action, and need not precede it) must imply it to pay her as being the principal creditor of the debtor ; whether it would imply it to both the plaintiffs might be asked, while both were living. I suppose it would, but she would be included ; so that, whether she were sole or married the law would imply a promise to pay her on request. The case would then amount to this, that when sole she lent the money, to be paid upon a contingency which did not happen till after she was married ; the original express promise was to her when sole, the implied

one was to her when covert, but whether sole or married, it was to her personally and directly; and, rejecting the allegation in the declaration of the words "*while she was sole and unmarried*," there would remain the allegation that he promised to pay her, and the fact would be proved, although such promise also extended to pay her husband, being during coverture—In *McNeil et al. v. Holloway* (1 B. & A. 218), the husband laid the implied promise arising during coverture to himself alone.

In cases of executors, administrators, assignees of bankrupts, &c., it is clearly settled that even to do away the Statute of Limitations when pleaded a promise to pay them in their representative capacity will not reflect back upon the original promise, so as to prove or support a promise only alleged to pay the testator, intestate or bankrupt, &c.—*Skinner v. Rebow* (2 Stra. 919), *Sarell v. Wine* (3 East. 409), *Powley v. Newton* (6 Taunt. 455), *Ward et ux. v. Hunter* (Ib. 210), *Hickman v. Walker* (Willes 29), *Pittam v. Foster* (1 B. & C. 248), *Tanner v. Smart* (6 Ib. 688), *Short v. McCarthy* (3 B. & A. 631), *Thornton v. Ellingworth* (2 B. & C. 824), see *Williams v. Moore* (11 M. & W. 256), *Gardner v. McMahon* (3 Q. B. 561), *Hart v. Prendergast* (14 M. & W. 741), *Bateman et al. Executors v. Pinder* (3 Q. B. 574), *Green v. Crane* (Lord Raym. 1101). I feel the full difficulty of this objection (*Pittam v. Foster*); still I am not satisfied that her being sole or married was material to be averred in that part of the declaration which alleges the promise to pay—*Bennion v. Davison* (3 M & W. 180). The substance of the issue is whether the defendant promised to pay her—in other words, whether the action accrued to her, as it certainly did; and the case of *Hart*, administrator of *Hart v. Stephens*, seems to me to justify the view I am disposed to take.—That was assumpsit on a promissory note of the defendant, made the 16th of February 1812, in the lifetime of the intestate, when sole, promising to pay her £200 with interest; *when* is not stated, but with averment that the defendant promised to pay her on request. Pleas—*non-fecit* and *actio non accrevit infra sex*

answ. Replication—that it did accrue. The payee, after the note was given, married, and afterwards died, and her husband survived; and, though he had repeatedly received the interest on the note during her lifetime, it was held that the note did not become his property, not being sufficiently reduced into possession, but passed to her administrator, and he was admitted as a good witness to prove the payments of interest, which payments were held to take the case out of the statute, being considered as made to him in the character of agent to the wife. The note may have become due *before* her marriage, and so the promise to pay on request may have arisen *dum sola*, but whether sole or married at the time is not stated in any of the reports of the case that I have seen. The promise implied from the payment of interest, though during coverture, is represented in the report to have been proved in support of a declaration alleging a promise to pay the intestate, and not to her and her husband jointly; and, as there was no express promise, it was a promise inferred as a fact from the admission of liability involved in the payment of interest. To apply it to the present case, if the money lent had become payable before or during coverture, and was over-due more than six years, and the defendant had paid interest to the husband John within six years, and while the plaintiff Anne was living, and she had died afterwards, and her administrator had sued for the principal sum lent; or if he had died leaving her surviving, and she was the sole plaintiff suing in her own right, and the promise laid was to her *dum sola*, to pay upon request, and the Statute of Limitations pleaded, I apprehend such payment of interest to the husband during their joint lives, would, if proved, take the case out of the statute, as being evidence of the admission of the debt, and warranting the inference of a promise to her, and to pay her upon request, upon the authority of the above case.

3rd. The Statute of Limitations only applies here if the money was lent payable on request more than six years before action brought. There is evidence of admitted

liability within six years, and it is not clear that some of these admissions were not made before Anne's marriage, and before the provincial statute 13 & 14 Vic. ch. 61, sufficient to warrant the inference of a promise to pay her *dum sola*, though there is no very distinct proof thereof. And if (the money being lent, payable on request) the defendant did, within six years, and before Anne's marriage, admit his liability and promise to pay when the farm was paid for, or the mortgage was satisfied, my impression is, that the event or contingency having occurred since the marriage renders the promise absolute, retrospectively, and not only from the time the farm or mortgage was paid for or satisfied. And in this light there is some evidence whence a renewed promise to pay her *dum sola*, and within six years, might be inferred—*Waters v. Earl of Thanet* (2 Q. B. 757. But, notwithstanding the original promise must satisfactorily be inferred from the evidence was to pay her when the farm was cleared in the first instance, and on request, when that event occurred, and which was after her coverture, the law did then imply a promise to her to pay her, although it may in legal intendment have included or extended to her husband likewise. The fact is nevertheless true of a promise to her, though not while sole and unmarried—*Booth v. Grorie* (M. & M. 182, S. C. 3 C. & P. 335), *Helmsley v. Loader* (2 Camp. 450), *Shearns v. Burnard* (10 A. & E. 593, S. C. 2 P. & D. 565). The question then is, whether, supposing the only promise in support of the action to be an implied one in law, arising during coverture, the promise laid in the declaration, so far as it is stated to have been made to her while sole and unmarried, can be rejected.

The cases above noted seem to me to go far in warranting it. There are therefore opposed the cases where the promise has been laid to the original party, and the proof or promise to a representative party, to be contrasted with such cases as above, where the promise is to the same party, and the promise, not the collateral fact of being sole or covert at the time, forms the substance of the issue. At all events, it is clear that if the objection be valid and the declaration

cannot be amended, and the verdict was set aside, the plaintiff would be allowed to add a count and all future objections would be precluded. It is not therefore like an objection going to the foundation of the action or right to recover at all, but only to the form of the averment of the promise to pay as laid in the declaration. The action is rightly conceived in assumpsit, and on an amended or additional count the plaintiffs would be clearly entitled to recover, for I do not see any reason to doubt the defendant's legal liability as for money lent, or that as respects the Statute of Limitations, that the late statute 13 & 14 Vic. ch. 61, passed the 24th of July 1850, and coming into force the 1st of January 1852, presents any difficulty. It is not clear there were not acknowledgments equivalent to a promise to pay before it passed, and if not the debt may have become payable since and within six years. Under such circumstances there is authority against disturbing the verdict—*Israel v. Douglass* (1 H. B. 241), *Mayfield v. Wadsley* (3 B. & C. 357, 362). In *Dyer v. Connelly* (12 Jur. 776), 17 Law Journal (Qb. 360), assumpsit for goods sold and delivered, the judge at *Nisi Prius* directed a verdict for the plaintiff, with leave to the defendant, with the plaintiff's consent, to move a non-suit "if the facts proved did not support goods sold and delivered." The facts being such as would support that count, if they led the jury to one conclusion on the intention of the parties, the court could not enter a non-suit; and it being obvious that if a new trial was granted to ascertain the intention, the plaintiff would obtain leave to insert a count for goods bargained and sold, which would be proved by the evidence, the court refused to grant a new trial. Lord Denman said, "the defendant had leave to move a non-suit if the facts proved did not support goods sold and delivered; we have heard them largely and learnedly discussed, and cannot arrive at a clear conviction on the law arising on these facts, because they are ambiguous. They would support that count if they led the jury to one conclusion on the intention of the parties, but not otherwise. There are strong reasons urged as to both sides of this question, and

we cannot avoid exercising a discretion in the case. We cannot enter a non-suit, because these are facts which would support the count for goods sold. We would grant a new trial to ascertain the intention, but it is obvious that if we do so the plaintiff will apply for and obtain leave to amend his declaration, by inserting a count for goods bargained and sold, which, as all agree, would be proved by the evidence produced by the plaintiff at the trial. We should be unwilling to make a rule absolute which would render the expense incurred useless, and could only produce the same result as the jury have already arrived at, with a great additional expense to both parties. We do not see that the proof fails, and therefore we are of opinion that the verdict must stand." Much of his lordship's language might be applied to the present case as it is now before us.—Also, see *Hopkins et ux. v. Logan* (5 M. & W. 243-4), *Norse et al. v. Willis* (4 B. & Ad. 739, A. & E. 69), *Parnhane & wife v. Hurst* (8 M. & W. 743), *Churchill v. Bertrand* (3 Q. B. 569), 1 Saund. 269 (b), 2 Ib. 63 (i) Upon the whole (though not free from doubt), I think the ends of justice are best answered by discharging this rule, and that we are warranted in doing so. It is uncertain whether the money was lent on credit or not. If on credit, the plaintiffs are clearly entitled to recover, irrespective of the Statute of Limitations; if not, then there is evidence of admission apparently within six years, and before the provincial statute 13 & 14 Vic. ch. 61, sufficient to take it out of the statute. There was also evidence of other loans of money apparently within six years, and before marriage, but when, and to what amount not distinctly appearing.

This decision is in accordance with what I consider the substantial justice of the case.

The plaintiff had no legal right to be allowed wages as a hired servant, nor the defendant to set off board, lodging and clothing, &c. The sister lived in the brother's family as a member of it; and neither did she work and labour, nor he maintain or clothe her, with a view to pecuniary compensation. The transactions formed a series of good offices proceeding from natural love and affection, and the

one was a balance of the other. But, as respects the legacy, or money lent by her to him, it is quite otherwise. It is not a legal defence that he had been a kind brother and guardian to her, and had rendered her services, and made her advances equivalent to the amount borrowed. The money was lent to be repaid, and no interest thereon seems to have been demanded or allowed ; his kind offices were gratuitous or counterbalanced by hers, and were not given with a view to their being set off against the money lent ; and I must say, that, judging from the evidence, I do not perceive on what equitable principle he could have expected to be exonerated from his liability for the money borrowed—to the extent, at least, of the present verdict.

I may also observe that the objection of variance in the proof of the promise to pay, as laid, might have been cured by an amendment at *Nisi Prius*, by substituting a promise to pay the plaintiffs instead of the plaintiff Anne *dum solo* ; and although the facts are not found and stated on the record, the verdict being rendered on the facts subject to the opinion of the court, the case is virtually within the provisions of the provincial statute 7 Wm. IV. ch. 3, sec. 16, which enacts, “ that the court or judge shall and may, if he or they think fit, in all such cases of variance, instead of causing the record to be amended, as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated upon such record ; and notwithstanding the finding on the issue joined, the court from which the record issued shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.” Had the facts been stated formally on the record, we should have had no difficulty in holding the variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the defendant in the conduct of his defence, or in giving judgment (as we do) according to what appears to us the very right and justice of the case—*Guest v. Elwes* (2 H. & W. 34),

S. C. (5 A. & E. 118), *Gayley v. Farrent* (4 Bing. N. C. 86), *Frankum v. Earl of Falmouth* (4 N. & M. 330, 2 A. & E. 452), *Knight McDonall et al.* (12 A. & E. 438).

McLEAN J., and SULLIVAN, J. concurred.

Rule discharged without costs.

NOTE.—When the above judgment was delivered, Mr. Wilson said, the course the case took at the trial had prevented the defendant going into his defence, and that he had a good one, but principally as he was understood to say that he had not paid off the mortgage: that Donoghue had done it upon the defendant's undertaking to give another mortgage to him, to which the C. J. observed that it appeared to him the event had arrived when the debt to the plaintiffs became payable: that if the defendant borrowed money, or induced another to satisfy the mortgage, so as to obtain its release after it had become due, upon his giving or engaging to give another mortgage to such person to secure the money advanced, and upon an extended credit, the old mortgage, so far as its payment respected the plaintiffs, must be considered satisfied, otherwise the defendant might delay the payment of this debt indefinitely, by renewing the mortgage, which could not have been the intention. It was also said that the provincial statute 13 & 14 Vic. ch. 61, sec. 1, was retrospective, and had been so held in the Court of Queen's Bench U. C., in a case of *Crooks and Notman*; and also in England in relation to a similar act there, Imperial Act 9 Geo. IV. ch. 14, sec. 1, as to the construction of which and like statutes see the following cases—*Edmunds v. Lawley* (6 M. & W. 285-8), *Nelalrop v. Scarisbrick* (Ib. 684), *Moore et al. v. Phillips* (7 M. & W. 636), *Doe dem. Johnson v. Liversedge* (11 M. & W. 617), *Simpson v. Ready* (11 M. & W. 344), *Warne v. Beresford* (2 M. & W. 848), *Stevenson v. Oliver* (8 M. & W. 241), *Morgan v. Thorne* (7 M. & W. 400), *Roadknight v. Green* (9 M. & W. 652), *Moore v. Durden* (12 Jur. 188, 2 Ex. R. 22), *Towler v. Chatterton* (8 Bing. 258), as to which see *Moore v. Durden*; *Ansell v. Ansell* (3 C. & P. 563), *Hilliard v. Lenard* (M. & M. 297), *Giles v. Grover* (9 Bing. 258), *Thompson et al. v. Lark* (8 C. B. 540), *Marsh v. Higgins et al.* (19 L. J. C. P. 297, 1 Prac. Rep. 253). It seems to have been so held and decided, although not apparently approved of in *Moore v. Durden*. The Chief Justice further remarked that the statute 13 & 14 Vic. came into operation on the 1st of January 1852, before the commencement of this suit; consequently his observations relative to oral acknowledgments of liability, whether *before* or after the passing of the act, were inapplicable; and that the case rested entirely upon the other branch of it, viz., a loan of money upon credit, to be paid not upon request, but at a future time when the farm or mortgage was satisfied or paid for. That the case then depended upon the sufficiency of an implied promise to pay on request, arising during coverture, to support the promise laid in the declaration of a promise to her, prefaced by what he regarded as amounting to the allegation, that it was while she was sole and unmarried. Upon that aspect of the case, he said, he had expressed his impressions at large, though not without doubt and hesitation.

HILARY TERM, 16 VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.

“ ARCHIBALD McLEAN, J.

“ ROBERT BALDWIN SULLIVAN.

**MARTIN KEELEY v. CORNELIUS HARRIGAN, CORNELIUS
BURK AND JAMES RYAN.**

Disputed boundaries—Original surveys.

In the first government survey of a township (Loughborough), the lines between alternate concessions only, as the 2nd & 3rd, 4th & 5th, 6th & 7th had been run and staked out, numbering from south to north. These lines were not straight but curved or bended southward in the centre of the township. It appeared (though not very satisfactorily) that several persons had, under government, settled according to these lines. Subsequently, a surveyor was employed by government to run the concessions omitted in the first survey—viz., 1st & 2nd, 3rd & 4th, 5th & 6th concessions. He did so; but instead of running them parallel to, or diverged, as the lines formerly surveyed, he ran them in straight lines, thus cutting off part of the rear of the northerly concessions and adding them to the front of the southerly concessions: *Held*, that such last mentioned survey could not be adopted as the governing one.

EJECTMENT. Writ tested 11th September 1852, issued 14th of same month.

This action was brought to recover part of Lot No. 17, in the 6th concession township of Loughborough, described as follows:—commencing on the side line between Lots Nos. 16 & 17, 44 chains 70 links distant from the front of the concession; then running south along the side line 21 chains 52½ links, to a post planted 50 links north of the centre of the space contained between the front of the 5th & 6th concessions; then east parallel to the front of the concession 28 chains 80 links, to the division line between Lots Nos. 17 & 18; then north along said line 23 chains 27½ links; then west 28 chains 80 links, to the place of beginning; containing by admeasurement 63 acres and 3 roods of land.

On the 30th September 1852 Cornelius Harrigan appeared and pleaded that the plaintiff was not entitled to possession

of the part of the said property for which he appeared—namely, being composed of the west one-third part of Lot No. 17, in the 5th concession of the said township of Loughborough, containing by admeasurement $66\frac{1}{2}$ acres, more or less, commencing at the north-west corner of the said lot on and at a certain road laid out in and along a certain line, and heretofore laid out as between the 5th & 6th concessions of the said township, by a deputy surveyor (Charles Rankin), and known as Rankin's line, and at the limit between said Lot No. 17 and the adjoining Lot No. 16, in the said 5th concession; then south along the division line between the said Lots Nos. 16 & 17, in the said 5th concession, $68\frac{1}{2}$ chains, more or less, to the front of the said 5th concession; then east 2 (*quare* 10) chains, more or less, to the limit between the west one-third and the east two-thirds of the said Lot No. 17; then north along said limit last mentioned $68\frac{1}{2}$ chains, more or less, to the aforesaid road, as laid out by the aforesaid Rankin; and then west 10 chains along the said road, more or less, to the place of beginning—and claimed by plaintiff as part of the lands in the writ mentioned. There was some confusion in the description. It appeared to embrace the rear or north part of the west one-third of Lot No. 17, in 5th concession; if it was 30 chains wide, the course east should, to be consistent, be 10 chains instead of 2 chains.

Nothing was said of the other two defendants, Burk and Ryan.

The case was tried before the Chief Justice of Upper Canada at the last (Kingston) assizes, when it appeared in evidence—

By letter of 16th October 1792, at Niagara, from Mr. Surveyor General Smith to Mr. Aitkin (who was a surveyor), he was directed (after performing certain other services not necessary to be here enumerated) to run the boundary lines of a township in rear and to the northward of Kingston, in the manner pointed out to him at the council, making (*quare* marking) the lots on the front concession, and the concessions on the side lines.

By another letter, of 11th January 1793, from the Surveyor

General to Mr. Aitkin, in answer to one from him of the 26th December 1792, the subject is again alluded to, with reference to the verbal communication which passed in council, and with directions to perform other specified services—"after you have made such progress in the rear of Kingston as you may conjecture sufficient for the settlers expected there."

Mr. Aitkin's letter of the 26th December 1792 was not in evidence.

By letter of 10th April 1793, written at Kingston, by Mr. Aitkin to the Surveyor General, acknowledging the receipt of his letter of the 12th January then last, and reporting that he had proceeded with the other services, "after laying out the front line of the township in the rear of the township of Kingston," a plan of which he transmitted. He further stated, the three persons who had got lands in it were American loyalists, and had an order from Mr. Wright, and seems to speak of it as Wright's township.

By letter of 30th May 1795, from the Surveyor General to Aitkin, written at Newark, the latter was directed, among other things, to proceed to survey some of the back concessions of Portland and Loughborough, and in the first concession on the lake side of Ameliasburgh to the extent of such orders of council on (*quære or*) certificates as might remain to be provided for.

By letter of 7th August 1796, written at Kingston, from Aitkin to the Surveyor General, he reported his return from Loughborough, being under the necessity of postponing the completion of the survey of that township until the winter, when the lakes were frozen over.

By letter of 11th October 1796, from Surveyor General Smith to Aitkin, he was directed, in consequence of the administrator of the government having approved of completing so much as remained unsurveyed of the township of Loughborough, &c., to execute the work accordingly as the duties of his trust would admit, adding in a postscript that he needed no sketch of Loughborough.

By letter of 14th June 1797, written from Kingston, by Aitkin to the Surveyor General, he reported his return after

running the 2nd, 3rd, 4th, 5th, 6th and 7th concessions, in the township of Loughborough and Portland.^(a)

On the 10th September 1801, Lot No. 19, 1st concession, and Lot No. 13, 2nd concession Loughborough, 400 acres, more or less, were granted to John McMullin, commencing where a post had been planted in front of the said concessions, at the south-east angle of each of the said lots; then north 67 chains 40 links; then west 29 chains 80 links; then south 67 chains 40 links; then east 29 chains, 80 links, to the place of beginning.

On the 10th March 1806, Lot No. 19 and west half of Lot No. 9, 2nd concession Loughborough, 300 acres, more or less, were granted to Donald McDonell, commencing in front of the said concession, at the south-east angle of each of the said tracts; then north 67 chains 40 links, more or less, to the allowance for road in rear of the said concession; then west 29 chains 80 links, more or less, to the western limit of the said half lot; then south 67 chains 40 links, more or less, to the allowance for road in front of the said concession; then east to the place of beginning in each parcel of land.

On the 27th March 1829, an order of council adopting a new mode of survey in townships about to be surveyed in the Western District—not apparently bearing upon the present case.

On the 9th April 1831, a minute in council.—Read the petition of John Campbell, Esq., setting forth that the township of Loughborough had been settled as far back as the 8th concession; but the lines between the 1st & 2nd, 3rd & 4th, 5th & 6th, 7th & 8th concessions had not been run, by reason whereof the inhabitants were much inconvenienced; nor had the remaining north part of the said township been surveyed and run into concessions: wherefore His Excellency the Lieutenant Governor was requested to order the said concession lines to be run, and a survey to

(a) NOTE—The concessions are numbered from south to north, and the lots from west to east, in numbers from one to twenty-six—the last, according to the plan, being a narrow lot, and Loughborough Lake intersecting both concessions to the east of No. 17.

be made of the north part of the said township. And upon also reading the report of the Surveyor General, of the 8th March 1831, it was recommended that he should be authorised to complete the necessary survey of the township.

It appeared in evidence, that in the original survey Aitkin only run the lines of alternate concessions, apparently planting three posts at the concession line, one to mark the centre of the allowance for road, and each of the others being respectively 33 links distant north and south of the centre post, to mark the north and south limits of such allowance; and that the concession lines were traced from the centre post. But whether, after running a concession line from west to east, he returned to the west side of the township, and so always traced the lines from west to east; or whether, after tracing a line from west to east, he then traced north the depth of two concessions on the east side of the township, and then run the concession line from east to west, and so on for each double concession alternately, did not appear. The reasonable inference seemed to be, that he always traced from the west side of each alternate concession to the east. Nor did it appear that posts had been planted to indicate the allowance for roads between the concessions not respectively run.

By letter of 16th January 1832, the acting Surveyor General Chewitt directed Mr. Chas. Rankin, deputy provincial surveyor, in obedience to the order in council of the 9th April previous, which was recited, to complete the survey of Loughborough, and stating that the north part was supposed to include the 9th, 10th, 11th, 12th, 13th and 14th concessions—that Aitkin, in his report of the 14th June 1797, reported that he had laid out the 2nd, 3rd, 4th, 5th, 6th and 7th concessions. Mr. Rankin was then directed to examine all the lines of concessions which Mr. Campbell stated not to have been surveyed and laid out, and to survey and lay out all those concessions which might be found not to have been laid out, but by no means to attempt to enter upon any of those concessions which Campbell stated to have been already laid out: that he was therefore to begin with the boundaries on the line to be fixed between the

first and second concessions; and having determined the depth of the line between the front of the 1st and 3rd concessions, he was then to divide the same into two equal parts on the eastern and western boundary line of the township, for the depth of the 1st and 2nd concessions; and then, in the centre between the same, he was to lay off the half allowance for road, being 50 links, on each side thereof: that he was next to proceed to run the line between the said 1st & 2nd concessions, and having *correctly* determined it, he was then to lay off on the eastern side of the western boundary line, the half allowance for road, 50 links, and on the western side of the eastern boundary line to lay off 50 links for the half allowance for road, and then to lay off 11 chains 27 links, for Lot No. 26; and having measured the distance between the western limit of Lot No. 26 and the eastern limit of the half allowance for road on the western boundary line, he was to deduct therefrom three allowances for roads of 1 chain each, equal to 3 chains, between Lots Nos. 6 & 7, 12 & 13, 18 & 19; and having ascertained the distance which remained between each of the said allowances for roads, to divide the same into lots according to the diagram therewith, and bound and mark the same according to their respective numbers, *and so forth* for all the intermediate concessions which had not been run and laid out: from the 7th concession to make the depth of all the concessions 67 chains, 40 links, and divide the concession lines into lots, as before directed, from the 7th concession, &c., to the rear of the 14th concession, between Loughborough and Bedford, &c. In conclusion, he was guarded against the *partial attraction*, or he would be thrown into error, as it was apprehended much would be found in that township.

By letter of 12th March 1832, from Mr. Rankin to the Surveyor General, he reported that on measuring the 2nd concession line of Loughborough he perceived a side road at the distance of 419 chains, 27 links from the west boundary, and at 153 chains further another side road; and that continuing the measurement to the Pittsburgh line, he discovered that after leaving 3 chains for three side roads,

and making No. 26, 11 chains 27 links, there remained sufficient to give to each of the remaining twenty-five lots 30 chains, and had made them so according to his instructions; but that some of the inhabitants, including Campbell, wished the roads above mentioned not to be interfered with, but to be made, as they had theretofore been considered to be, the boundaries between Lots Nos. 14 & 15, and 19 & 20, corresponding as they did with roads opened and established along the limits between the same numbers in the 1st concession—to allow which, however, the lots from 1 to 14 inclusive would each be 29 chains 80 links, while those between 14 and 20 would be 30 chains 20 links, and from 20 to 28 30 chains 23 links each, unless 26 took a share of the overplus—and recommending it if practicable, as the roads in question had been long established, had much statute labor done on them, and were in a good state; and that it would still leave the narrow lots containing 200 acres, though the owners might object to other lots being more, &c.

By letter of 22nd March 1832, the Surveyor General answered the last—that according to the measurement on the plan the roads fall nearly as reported by Mr. Rankin; but that he had no authority to change the position of any of the side roads—suggesting, however, that the magistrates in quarter sessions might act upon the petition of the inhabitants, &c.

On the 28th March 1832, Mr. Rankin wrote to the Surveyor General to say that he observed (and attributed the fact to the various pointing of the needle in that township not having been noticed or attended to) that the old concession lines—viz., those between the 2nd & 3rd, the 4th & 5th, and the one in front of the 7th concession, were very irregular, bending in general in the middle part of the township a good deal to the southward, while on either boundary the points fixed were right, on which account the owners of the middle numbers in the 2nd and 4th concessions would be great losers in the depth of their lots, while the same numbers in the 3rd and 5th concessions would, in an equal degree, gain in depth; and that he had reported

first survey : that they then retraced to the 4th & 5th concession line, and down the side line of Lots Nos. 4 and 5, and found new blazes on the 4th & 5th concession line : saw an original post at Lots 6 and 7, and at Lots 8 and 9 on that line : that concession line was the first road travelled in the township : saw also original posts at Lots Nos. 12 and 13—double posts, 33 feet each side of the blazed line : that in going along the 6th and 7th concession line posts had been found at Lots 6 and 7 : that only three concession lines were originally run—that is, between the 2nd and 3rd, 4th and 5th, 6th and 7th concessions, but the lines were not straight : that in 1832 Rankin run the lines between the 1st and 2nd, 3rd and 4th, and 5th & 6th concessions : that there was a travelled road called Rankin's line between the plaintiff's and the defendants' possessions, the defendant being on the north side, and both sides fenced, and a house (which an equal division would take into the plaintiff's lot), erected ten or twelve years ago.

From the evidence given it was clear that the alternate concession lines only had been originally run, and that there was no dispute touching the lines between the 4th and 5th, and 6th and 7th concessions, and the people had settled by them, all being now well settled to Loughborough Lake.

There was evidence that Ryder run a line between the 5th and 6th concessions where none had been run originally by Aitkin ; but whether he planted stakes or not was not certain, as the witnesses seemed to differ on the subject, one saying he did not, and another that he had seen posts planted by him between the 5th and 6th concessions.

Rankin's line seemed to have been more or less disputed from the beginning.

It appeared that the west half of lot 14, 6th concession, was occupied in the year 1830, before any line was run between the 5th and 6th concessions, the rear of the 6th concession being clearly ascertained.

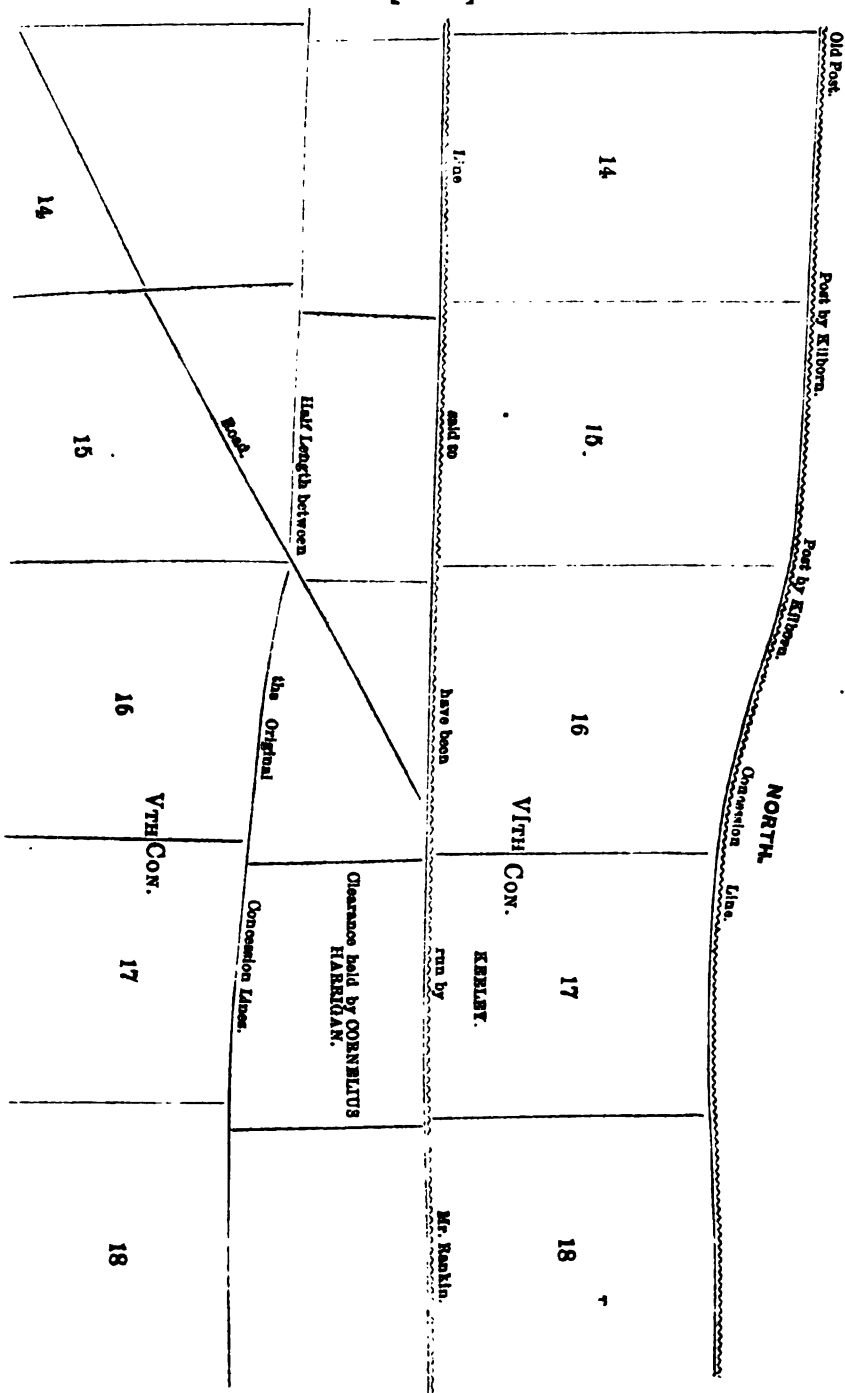
Lot No. 13, 6th concession, was also occupied in 1830, and both persons who entered claiming half the distance between the front of the 5th and rear of the 6th concession,

with an allowance of sixty-six feet for a road in the centre between the 5th & 6th concessions: that the difference to the plaintiff between an equal division which he claimed, and Rankin's line, would be twelve acres, the two concessions together being a little deficient in the width of the lots.

The evidence has thus been stated a good deal in detail rather than the facts or conclusions supposed to have been established or drawn by the jury from such evidence, as the case involved general points of much importance.

Two plans were with the exhibits—one a certified copy of Mr. Rankin's explanatory plan, shewing the way in which the settlers in Loughborough were affected by the late survey, and the other a private one without any name attached—intended to exhibit the course of Aitkin's lines on the south of the 5th, and north of the 6th concessions, and of two lines dividing the concession, one according to Rankin's survey, and the other by an equal division, parallel to Aitkin's lines, the space between the two in Lot No. 17 was the tract in dispute.

[The second of these plans is given on the following page].



It was objected for the defendant that he was entitled to a demand of possession, but it was overruled.

Upon the whole evidence a verdict was taken for the plaintiff, subject to the opinion of the court.

In the following term (Michaelmas term last), *Draper* for the defendant, obtained a rule upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a verdict be entered for the defendant, pursuant to the leave reserved at the trial, or a new trial be had, on the ground that the verdict was contrary to law and evidence.

O'Reilly shewed cause during the same term, and referred to the statute 12 Vic. chap. 35, secs. 37 & 38, as governing the case. He contended that the concessions were originally laid out to be of equal depths, although the south and north boundary lines of the two were alone run, and that the division line was to correspond : that Rankin's survey could not control, and if it could, that he did not follow his instructions, which were, that he was correctly to determine it, and to make the depth of each concession 67 chains 40 links, which he had not done : that he was required to divide the concessions equally by a straight midway line, with 67 chains 40 links to a concession; a straight line from the two extremities of the township or concession, such as he run, curtails No. 17 in the 6th concession, and enlarges it in the 5th; and that although the plaintiff's patent was long since Rankin's survey, he was entitled to an adherence to the original survey in determining his bounds.

McKenzie, in reply, submitted that the defendant having been twelve years in possession, improving the land in dispute under the plaintiff's eye, was entitled to a demand of possession—*Doe ex. dem. Sheriff v. McGilliveray*, Q. B. U. C., Michaelmas Term 5 Vic., Rob & Har. Dig., title—"Ejectment, 15." On the main point he contended that Rankin's line was run at the instance of some of the settlers, and before any of the lots to be effected thereby had been granted by the Crown, or located to settlers; wherefore his line did, as to the concessions not previously divided, constitute the original survey, and ought to prevail;

and moreover, that it was confirmed by the late act of 12 Vic. chap. 35, sec. 32: that his survey was the original one between the 5th and 6th concessions, and that his posts marked the south-west and south-east angles of the lots in front of the 6th concession, and beyond which the plaintiff could not go: that he was instructed to run a straight line from the centre of the two concessions, on the west and east limits thereof, and had done so; and that Mr. Justice Jones, at Nisi Prius had held his line to be a lawful one: that while the estate in the lots remained in the government, the crown could correct or alter surveys not yet acted upon in grants governed thereby, and had done so in this instance, before any patents had issued, so far as the limit between the 5th & 6th concessions depended upon the lines in front and rear of these concessions, both of which, unless quite parallel throughout, could not be adopted and followed. He referred to the provincial statute 50 Geo. III. chap. 1, 59 Geo. III. ch. 14, secs. 2 and 9, and 12 Vic. chap. 35, sec. 32, as governing the question. He also referred to sec. 31 of 12 Vic. chap. 35. He submitted that, however, the 38th sec. of the last act might have operated had it not been for Rankin's line, still, that line having been confirmed by sec. 32, must prevail.

MACAULAY, C. J.—The statute 38 Geo. III. chap. 1, passed 5th July 1798, for ascertaining and establishing on a permanent footing the boundary lines of the different townships of the province, and repealed in the 12th Vic. chap. 81, sec. 30, authorised stone monuments &c., to be placed at the several corners, governing points or offsets of every township that had been, or might thereafter be surveyed; and also at each end of the several concession lines of such townships; and that lines from the monuments so erected should be taken and considered as the permanent boundary lines of such townships and concessions respectively by sec. 2, to be done under the inspection of the Surveyor General.

The 50th Geo. III. chap. 1, provided for the laying out, amending and keeping in repair the public highways and roads, &c.; enacted by sec. 12 that all allowances for roads

made by the the king's surveyors in any town, township, or place already laid out, or which shall be made in any town, township or place within this province ; and also, all roads laid out by virtue of any act of parliament, or any roads wherever the public money hath been expended for opening said roads throughout the province, or wherever statute labour hath been usually performed, &c., shall be deemed common and public highways, unless, or until altered according to the provisions of that act.

The 59th Geo. III. chap. 14, passed 27th November 1818, enacted (sec. 2), that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts or monuments which have been placed or planted at the front angles of any lots or parcels of land in the first survey, *intended* to determine the width of such lots or parcels of land, provided such survey has been performed under the authority of the executive government of the late province of Quebec, or of this province, shall be, and the same are thereby declared to be the true and unalterable boundaries of all and every of such townships, concessions and lots, respectively ; and that every lot or parcel of land respectively, whether it shall upon admeasurement be found to contain the exact width, or more or less than what may be expressed in any letter patent, grant or other instrument in respect of such boundaries or lines mentioned or expressed, shall embrace the whole width contained between the front posts, monuments, or boundaries planted or placed at the front angles of any such lot or parcel of land, as aforesaid, in such original survey as aforesaid, and no more nor less, &c., anything in such patent or instrument to the contrary thereof in anywise notwithstanding. Sec. 3—That the boundary line of each and every township on that side from which the lots are numbered shall be, and the same is declared to be the course or courses of the respective division or side lines throughout the several townships and concessions of this province respectively ; and all surveyors shall, and are thereby required to run all divisions or side lines—which they may be called upon by the owners of any lands to survey—to correspond with, and be

parallel to the respective town lines from whence the lots are numbered. Sec. 9—That the front of each concession, lot, or parcel of land, shall be considered to be, and the same is thereby declared to be that end or boundary of such concession, lot, or parcel of land which is nearest to the boundary of the respective townships from which the several concessions thereof are numbered. Secs. 10 & 11 provided for ascertaining the side lines between lots where several lots are embraced in one patent, or the original posts or monuments cannot be found.

Thus stood the statute law at the time of Rankin's survey.

12 Vic. chap. 35, sec. 1, repealed the above acts, and provides that all the boundary or division lines legally established or ascertained under their authority shall remain good; and all other acts and things legally done and performed under the authority of the said acts, or of any of them, and in conformity to the provisions thereof, shall remain good and valid. Sec. 26 provides for placing stone monuments at the corners of townships and ends of concession lines, &c.; and that lines drawn therefrom in the manner thereafter prescribed shall be taken, and considered to be the permanent boundary lines of such townships and concessions respectively; sec. 27, to be placed under the direction of the Commissioner of Crown Lands. Sec. 28—That the courses and lengths of the said boundary lines so ascertained and established shall on all occasions be taken to be the true courses and lengths of the boundary lines of the said townships and concessions, whether they do or do not on actual survey coincide with the courses and lengths in any letters patent of grant, &c. Sec. 31—reciting that in several of the townships in Upper Canada, some of the concession lines, or parts of concession lines, had not been run in the original survey performed under competent authority; and that the surveys of the same concession lines, or parts of concession lines, had been obliterated, and that owing to the want of such lines the inhabitants of such concessions were subject to serious inconvenience—enacted that the *District Councils* (as to this, see 13 & 14 Vic. chap. 64,

sec. 7), upon application of half the resident landholders in any concession, or without any such application, might apply to the governor to cause any such line to be surveyed, and marked by permanent stone boundaries, under the Commissioner of Crown Lands; and (after providing for defraying the expense thereof,) that the lines, or parts of lines so surveyed and marked as aforesaid, should thereafter be taken and considered to be the permanent boundary lines of such concessions, or parts of concessions, to all intents and purposes of law whatsoever: provided always that the said lines should be so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey. Sec. 32—That all boundary lines of townships, &c., or concession lines, governing points, and all boundary lines of concessions, &c., and all side lines and limits of lots surveyed (and all posts or monuments which have been placed or planted at the *front* angles of any lots or parcels of land)—provided the same have been, or shall be marked, placed or planted under the authority of the executive government of the late province of Quebec, or of Upper Canada, &c.—*shall be*, and the same are thereby declared to be the true and unalterable boundaries of all and every of such townships, &c., concessions, &c., and lots or parcels of land respectively, whether the same shall, upon admeasurement, be found to contain the exact *width*, or more or less than the exact *width* expressed in any letters patent, grant or other instrument, in respect of such township, concession, lot, or parcel of land mentioned and expressed; and such township, concession, lot, or parcel of land, shall embrace the whole width contained between the front posts, monuments or boundaries planted or placed at the front angles of such township, concession, lot, or parcel of land, as aforesaid, so marked, placed or planted, as aforesaid, and no more nor less, any quantity or measure expressed in the original grant or patent thereof, notwithstanding, &c., and so of any less quantity, &c. Sec. 35—That the course of the boundary line of each and every concession on that side from which the lots are numbered, shall be, and the same is.

declared to be the course of the division or side lines throughout the several townships or concessions, respectively, if intended in the original survey to run parallel to the said boundary, &c., &c. Sec. 36—That the front of each concession in any township where only a single row of posts has been placed on the concession lines, and the lands have been described in whole lots, shall be considered to be, and are declared to be that end or boundary of such concession which is nearest to the boundary of the township from which the several concessions thereof are numbered : *provided* that when the line in front of any such concession has not been run in the original survey, the division or side lines of the lots in such concessions shall be run from the original posts or monuments placed or planted in rear line thereof, parallel to the governing line determined as aforesaid, to the depth of the concession, that is, to the centre of the space contained between the lines in front of the adjacent concessions, if the concessions were intended in the original survey to be of an equal depth, &c., having due respect to any allowance for a road or roads made in the original survey ; *and* that a *straight line* joining the extremities of the division or side lines of any lot in such concession, drawn as aforesaid, shall be the true boundary of that end of the lot which has not been run in the original survey. Sec. 37—That in those townships in which the concessions have been surveyed with *double fronts*—that is, with posts or monuments planted on both sides of the allowances for roads between the concessions—and the lands shall have been described in half lots, the division or side lines shall be drawn from the posts at both ends to the centre of the concession ; and each end of such concession shall be, and is declared to be the front of its respective half of such concession ; and that a straight line joining the extremities of the division or side lines of any half lot in such concession, drawn as aforesaid, shall be the true boundary of that end of the half lot which has not been bounded in the original survey. Sec. 38—That in those townships in which *each alternate concession line* only has been run *in the original survey, but with double*

fronts, as aforesaid, the division or side lines shall be drawn from the posts or monuments on *each side* of such *alternate* concession lines, to the depth of a concession, that is, to the centre of the space contained between such alternate concession lines (if the concessions were intended in the original survey to be of an equal depth, &c.); and each alternate concession line, as aforesaid, shall be, and the same is declared to be the front of each of the two concessions abutting thereon. Sec. 39—That every land surveyor, when employed to run any division line or side line between lots, or any line required to run parallel to any division line or side line in the concession in which the land lies, shall (if not done before, or if the course cannot be ascertained), determine by astronomical observation the true course of a *straight line* between the front and rear ends of the *governing boundary* line of the concession (and shall run such division line or side line, as aforesaid, truly parallel to such straight line, if so intended in the original survey, &c.), which shall be deemed to be the true course of the said *governing or boundary* line for all purposes of that act, although such governing or boundary line as marked in the field, be curved, or deviate otherwise from a straight course; and the same rule shall be observed if a line is to be run at any angle with a front line or other line which may not be straight. Sec. 40 provides for cases where the original post or monument cannot be found.

The field notes and original plans of original surveys, or copies thereof, seem admissible in evidence, by virtue of this act, and of the 12th Vic. chap. 31, secs. 12 & 13; and see Doe ex. dem. Strong v. Jones (7 U. C. R. 385), Doe ex. dem. Talbot v. Paterson (3 U. C. R. 431), Doe ex. dem. Stuart v. Forsythe (1 U. C. R. 324).

[Here the Chief Justice read the evidence as given in the statement].

After having thus gone carefully through the evidence and the statutes that relate to the subject, it appears to me the soundest conclusion is that Mr. Rankin's survey cannot be adopted as an original survey, or as confirmed by the executive government or the legislature.

It is clear that Aitkin, in running the alternate concession lines, laid out the 5th & 6th concessions in one block, the lots in each concession being intended to be of equal depth. Had he run the line between the 5th & 6th concessions, and placed posts to mark the front angles of the lots in the latter, of course such line and posts would have governed according to the statute of 59 Geo. III. chap. 14, but he did not do so ; and although under that statute the front of the 6th concession would be the south side, it ceased to be so upon the passing of the 12th Vic. chap. 35.—See sec. 38, at the end.

Mr. Rankin was instructed, correctly to determine the lines between the 1st & 2nd, 3rd & 4th, and 5th & 6th concessions : that he considered accomplished by equally dividing the double concessions respectively on the west and east boundaries of the township, and then connecting those points by straight lines from one to the other, without regard to their being parallel with the lines which Aitkin had run, or to their corresponding in the depth of the respective lots with the depth intended in the original survey ; the effect, it is said, was to curtail the depth of many of the lots in the 2nd, 4th & 6th concessions, and to increase it in the 1st, 3rd & 5th concessions, contrary to such intention. Had Aitkin's line curved or deviated to the north instead of the south, in the central portions of the concessions the effect would have been the reverse of what it is—although in laying off the lots along the front of the 1st, 3rd & 5th concessions, Aitkin evidently intended that each lot should have a depth sufficient to embrace according to its width the number of acres imported on his plan. The effect of Mr. Rankin's line was, therefore, not to carry out the original survey as it would have been had it been completed along each concession line in the first instance—but to trace new lines conflicting with the old ones—and causing a division not originally contemplated. It is said this can be no objection in the mouth of the plaintiff, because the estate in the lot in question, if not in all the lots in the 6th concession, remained in the crown when Rankin's survey was made ; and that the King might

therefore, at any time before granting the same determine the boundaries by which future grants were to be governed. On the other hand, it is said, that such remark could not apply to the concessions south of the 5th, and that according to Campbell's representation to the government in 1832 the township had been settled as far back as the 8th concession: that it was not shewn when the locations in the 5th & 6th concessions were made (the locations, and not the grants, being the most material); and that although No. 17, 6th concession, was not granted until the year 1850, it may have been located before 1832, and was granted as containing 200 acres, which it could not according to Rankin's line; and at all events, that Rankin's line must be upheld as to all the concessions south of the eighth, or be rejected as to all, and that the government could not establish new concession lines after the act 59 Geo. III. chap. 14, was passed, contrary to what was done and intended in the previous, though incomplete original survey.

It is well known that in laying out townships into concessions and lots, complete surveys of each concession and lot, were not made so as to establish the front, rear and side lines of such concessions and lots, and to fix the several angles thereof, and to designate the allowances for roads, but that portions only of the lines and posts necessary to define the same were run or placed in the original survey, one line being often run to divide two concessions, and to indicate an allowance for road between them, and posts being planted at the front angles of the lots to establish their width, and mark the side roads running through the concessions, but leaving the rest to be carried out by the owners, or the inhabitants, as occasion might afterwards require. The inaccuracy attending what was done, and the difficulties and want of data to complete what was left undone, gave rise to the several statutes now under consideration. To apply them to the present case, although no posts were planted, or lines run to define the allowance for road between the 1st and 2nd, 3rd and 4th, and 5th and 6th concessions, by Aitkin, still it is clear that an allowance for road was made by him between those

concessions respectively; and the statute 50 Geo. III. ch. 1, sec. 12, established them as highways; and Rankin's survey may be tested by asking whether it correctly traces the line of road so allowed and adopted, for if not, it must be inaccurate. The termini, or the west and east sides of the township, are correctly ascertained; but although the plan imports that the roads were to be straight lines, it also shews that they were to be parallel to the other roads, the lines of which had been traced—and to divide the concessions equally, which is not done. It appears to me the statutes 50 Geo. III. chap. 1, and 59 Geo. III. chap. 14, apply equally to all the first six concessions of Loughborough, and that Rankin's survey could not infringe thereupon. Then it may be asked what was the proper principle by which to lay out the allowance for road, and determine the south-west and south-east angles of the lots in front of the 6th concession, assuming the southerly side to be the front of such concession, according to the last statute, sec. 9. The statute does not distinctly provide for such a contingency, and is not clearly worded; but it says, among other things, that all concession lines and governing points shall be the true and unalterable boundaries of such concessions, &c. (meaning) according to the first survey intended to determine the same; although the first survey intended to determine the width of the lots, &c., as used in the act, strictly applies to lots only, and not to the townships or concessions otherwise than as affected or governed thereby. Now, in the first survey no concession line was run, and no posts were planted or placed between the 5th and 6th concessions, but concession lines were run in front of the 5th and rear of the 6th concessions, and posts were planted and placed, intended to determine the width of the lots. These constitute the only governing points. The first of these lines was along the front of the 5th concession—the south front of the 6th was intended to be parallel thereto—and if the line afterwards run between the 6th and 7th concessions was intended equally to mark the rear of the 6th, and front of the 7th concession, and the posts planted on each side of that line were intended to

mark the angles of the lots in those concessions respectively ; in that event (with reference to sec. 10 of the last mentioned act), the lots in the 6th concession would be ascertained by tracing the side lines from such posts up to the front of the 6th concession, and this would be the most correct course to pursue : but still it would be necessary to find the front or south line of the 6th concession : that could only be done by an equal division of the space between the two, or by determining the northerly line of the road allowance. If the lines in front of the 5th, and in rear of the 6th concession, were not truly parallel, a middle line or road allowance could not be run parallel to both. If parallel, that should be done ; if not, the only alternative would be a straight line such as Rankin's—a medium line, or a line parallel to the front of the 5th, or rear of the 6th concession—the last, I am disposed to think preferable ; for it would be doing as near as might be what the original surveyor would have done ; and in proceeding as he did assumed would be done, or was capable of being done. In such point of view Rankin's line was unauthorised. It did not square or correspond with the only lines, governing points or data, by which the original intention, and the equal division of the concession and lots, could be effected.

But, independent of all this, it does not appear that his lines were ever adopted or confirmed by the government. His operations led to prompt remonstrances in 1832 ; his report thereon does not appear, and the last we see is the minute of council in 1836, four years later, in which the statutes are referred to ; and it is said the petitioners' case must be settled by course of law, or by act of the legislature. Under such circumstances I do not consider that Rankin's survey can be regarded as confirmed by act of the legislature under the 12th Vic. chap. 35, sec. 1, as having been legally done under the former acts ; or sec. 32, which, I think can only be construed to extend to surveys made under, and approved of by the government—It enacts (among other things), that all concession lines, governing points, and all boundary lines of concessions, &c., shall be true and unalterable boundaries of every such concession,

&c., meaning—although (like the 59th Geo. III. chap. 14, sec. 2), obscurely expressed—provided the same shall have been, or shall be marked, placed or planted under the authority of the executive government,—a construction indicated by the concluding portions of the section. And I cannot say that I think it can be held on the evidence before us that Rankin's line between the 5th and 6th concessions, is to be regarded as having been run, and as existing under the authority of the executive government, within the meaning of that act, when the statute 12 Vic. chap. 35, was passed. I think the statute is intended to embrace original surveys or other like operations regularly sanctioned and approved by the government, and not to an irregular survey such as Rankin's; and which (being remonstrated against) received no confirmation or final approval, as the minute of council shews, and as the very grant of the Lot No. 17, 6th concession indicates.

The case therefore comes within the 12th Vic. chap. 35, secs. 31 and 38; nothing having been done in relation thereto under sec. 31, it depends upon sec. 38. The meaning of double fronts in sec. 38 is explained by reference to sec. 37—that is, “with posts or monuments planted on both sides of the allowances for roads, between the concessions;” and evidence thereof having been given, I take it we are to assume that posts on each side of the alternate concession lines in Loughborough, thirty-three feet therefrom, were planted in the original survey. If so, then the 38th section enacts that in those townships in which each alternate concession line only has been run in the original survey—but with double fronts, as aforesaid—the division or side lines of the lots shall be drawn from the posts or monuments on *each side* of such alternate concession line to the depth of the concession—that is, to the centre of the space contained between such alternate concession lines, if the concessions were intended in the original survey to be of an equal depth; and that each alternate concession line shall be the front of each of the two concessions abutting thereon. It is to be intended therefore, that in the original survey posts were planted to mark the north-west and north-east angles

of Lot No. 17, 6th concession, at the distance of thirty-three feet southerly from the line run between the 6th and 7th concessions; and it is clear that the 5th and 6th concessions were intended in such survey to be of an equal depth; consequently the lot is to be ascertained by tracing from the north limit or front thereof to the centre of the space contained between the lines dividing the 4th and 5th, and 6th and 7th concessions, allowing for roads thirty-three feet between the south line and the front of the 5th concession, and sixty-six feet between the 5th and 6th concessions. Determining the plaintiff's case therefore, as suggested in the minute of council of 25th August 1836, the effect will be to entitle the plaintiff to recover. Whether a public right of way across any portion of the tract thus recovered has, by long use or otherwise, become established, is not at present a question before us. If it has, this recovery does not entitle the plaintiff to obstruct it; if it has not, it is, I suppose, in the power of the township council to establish the present travelled road according to Rankin's line, by a by-law passed for that purpose.

McLEAN, J.—There is no doubt that the government, before conceding any lands in the 5th or 6th concessions, could have established any boundary which might seem proper between them; and that the lands in these concessions might have been granted according to such boundary; but after issuing patents for lots in each concession, they could not interfere with the boundary so as to disturb the rights acquired under such patents. Mr. Rankin's line between these concessions was run for the accommodation of the inhabitants, long after the original survey, but it could not have the effect of taking from parties in the 6th concession lands which they were entitled to hold under their patents, and adding them to the 5th concession. There is, it appears, sufficient land in the space between the line in front of the 5th concession and that in rear of the 6th to give to the inhabitants of each concession their full complement; but according to Mr. Rankin's line the owners of lands in the 6th concession would some of them have too little, while the owners in

front of them in the 5th would have too much ; this apparent injustice could not, however, affect the rights of parties, if, according to law, the line must be regarded as an original line, and establishing the boundary between the two concessions.

All question, however, on that subject seems to be set at rest by the 38th section 12th Vic. chap. 35, which expressly provides for cases like the present : that section declares " that in those townships in which each alternate concession line only has been run in *the original survey*, but with double fronts" (that is, a front on each line, as I understand it), " the division or side lines shall be drawn from the posts or monuments on each side of such alternate concession lines to the depth of a concession—that is, to the centre of the space contained between such alternate concession lines, if the concessions were intended in the original survey to be of an equal depth ; or if not so intended, to the proportionate depth intended in the original survey, as shewn on the plan and field notes ;" and each alternate concession line is declared to be the front of each of the two concessions abutting thereon. The alternate lines between the 2nd and 3rd, 4th and 5th, and 6th and 7th concessions of Loughborough were the only lines run affecting those concessions in the *original survey*, as appears by the evidence and plans at the trial ; consequently the owners of land in the 6th concession must now look upon the line separating their concession from the 7th as their front ; the 5th and 6th concessions were intended to be of equal depth, and lots in the 6th must therefore be measured from the front to the centre of the space between the front and the line between the 4th and 5th concessions, and not merely to the line run by Rankin. By this mode of admeasurement, which the clause cited authorises, the defendant appears clearly to be in possession of land in the 6th concession belonging to the plaintiff, and this being the case the verdict cannot be disturbed.

SULLIVAN, J.—Before the statute of Upper Canada 38 Geo. III. chap. 1, the rights acquired by the grantees of the crown regarding their boundary lines, and the locality

of the allowances for public highways, or easements intended for the public benefit, depended upon the language used in the grant or other document by which the crown parted with its right in favour of the subject; and where the terms of the grants or dedications happened to be conflicting, as applied to the subject matter thereof, then the rights acquired thereunder depended upon the priority of the instruments by which concessions were made by the crown to the subject, the same rules of construction applying which we now use in giving effect to conveyances from one subject to another, when not interfered with by statutory provisions. Thus a township was legally placed not where an erroneous surveyor located its boundaries, but where he should have placed them according to his instructions; and particular allotments to grantees were legally placed in their intended positions, and not according to the erroneous placing of posts and monuments on the ground. Natural boundaries, such as rivers, lakes, trees, or monuments, where the description in the grant called for them, prevailing as they now do, over descriptions by courses and measurements, if the one should be found inconsistent with the other. But the absolute impossibility of making surveyors work on the ground, raised by hill and valley over land covered with the aboriginal forest—the views of the surveyors obstructed by these, and these difficulties increased by waters and swamps—to correspond with plans projected upon paper, and founded upon rough surveys of territory upon a large scale, seems to have occurred to the legislature at the early period of passing this act (1798), when the interests involved both as regards the quantity of land conceded, and its pecuniary value, were trifling in comparison with what these interests now are. It was accordingly enacted, “that stone monuments, or monuments of other durable materials, shall be placed at the several corners, governing points, or offsets of every township that hath been surveyed, or may hereafter be surveyed, and also at each end of the several concession lines of such townships; and the lines from the monuments so erected, or to be erected, be taken and considered as the

permanent boundaries of such townships and concessions respectively."

The 3rd section enacts "that the courses and distances of the said boundary lines so ascertained and established, shall on all occasions be, and be taken to be the true courses and distances of the boundary lines of the said townships and concessions, whether the same do or do not on actual measurement coincide with the courses and distances in any letters patent of grant, or other instrument in respect of such boundary lines mentioned and expressed."

The 5th section provides "that it shall not be necessary for the surveyor general to proceed to carry the provisions of this act into execution until application shall be made to the governor, &c., by the magistrates of any district or county not being part of a district, in quarter sessions assembled, signifying that the erecting such monuments, and ascertaining such boundaries as aforesaid, is necessary and expedient for some particular township or townships within such district or county."

It appears to me that the work of surveyors on the ground was not made by this statute to have the effect of ascertaining the true boundary lines of the lands surveyed, but that the monuments to be placed under the direction of the surveyor general, in the particular instances in which the provisions of the statute should be carried into operation, were intended to have that effect, otherwise the boundaries remained as before, to be ascertained by the language of the grants, and by legal construction.

The provisions of the act of 1818 (59 Geo. III. chap. 14), made a vast addition to the certainty of the location of boundary lines: by the second section it is enacted, "that all boundary lines of townships, all concession lines, governing points, and all boundaries, posts or monuments which have been placed or planted at the front angles of any lots or parcels of land, in the first survey, intended to determine the width of such lots or parcels of land, (provided such survey has been performed under the authority of the executive government, &c.,) shall be, and the same are hereby declared to be the true and unalterable

boundaries of all and every such *townships*, concessions and lots respectively; and that every lot or parcel of land respectively, whether it shall upon admeasurement be found to contain the exact width, or more or less than what may be expressed in any letters patent, grant, or other instrument, in respect of such boundaries or lines mentioned and expressed, shall embrace the whole width contained between the front posts, monuments or boundaries, planted or placed at the front angles of any such lot or parcel of land as aforesaid, in such original survey as aforesaid, and no more or less, and every half or quarter of such lot or parcel, its proportion, anything in such patent or instrument to the contrary thereof in anywise notwithstanding." I think that this act applies to all original surveys made after the passing of the act as well as before; and by the original survey I do not think the very first survey on the ground is necessarily meant, but that survey which the executive government has adopted and acted upon, and of which it has shown its adoption, by making grants, concessions and dedications, by which individuals have acquired legal rights as against the crown. So long as the land contained in a tract of country, township or concession, remains altogether in the hands of the government; and so long as by no change in the first survey any vested rights are affected, I think it is competent to the crown totally to change the face of the survey, to adopt another plan, to correct erroneous surveys, and cause new surveys to be made generally or in part, at its pleasure—the survey finally acted upon being, in contemplation of the statute, the original survey—*Rex v. Allan et al.* (2 O.S. 90), *Doe Talbot v. Paterson* (3 U. C. R. 431).

But in case there were no survey on the ground to which the language of the act could be made to apply, it seems to me that we are to ascertain boundary lines, as they were ascertainable before the passing of the statute, by the courses and distances expressed in the patents or other instruments conceding the land, or conceding rights to individuals, or to the public as against the crown; and probably in many such cases, original plans, instructions

to surveyors, and returns of surveys on paper, adopted by the government, would be held to aid in the construction of letters patent, or of acts of dedication by the government.

The statute I first cited (18 Geo. III. chap. 1) might seem to apply to cases where no original survey was made on the ground of particular lots or concessions, and to authorize the surveyor general to cause monuments of stone or other durable materials to be placed at the corners, governing points or offsets of every township that *hath been surveyed*, or which thereafter might be surveyed; and also at the ends of the several concession lines of such townships; and that lines from the monuments so erected should be taken and considered as the permanent boundary lines of such townships and concessions respectively. But in the first place the language of the statute expressly applies to townships which have, or shall be surveyed, which I take to be an original survey adopted and acted upon; and it would with me be very difficult to say, that in case of a concession not surveyed, such an authority was remaining after grant of the land by the crown, but I do not see that the question comes up in this case. The surveyors, under the order made in 1831, merely planted stakes at the ends of the concession line. I do not think they either acted, or were directed to act, under the statute of 1818.

If then that survey be not helped by this statute, and if grants by letters patent or location tickets were made upon the disputed concession line previously to 1831, it appears to me that as the line then stood, the settlers had then a right to take possession of these lands, and to enjoy the allowances for road through them, according to the construction of the letters patent, or the plans returned to the government, or as the one might explain the other; and the executive government had no right *ex mero motu*, by such a survey as is in proof in this case, to alter or abridge the rights so conceded.

The next question is, whether under the statute 12 Vic. chap. 35, the present case is provided for; and, supposing always that grants or locations had been made previously to 1831 in the disputed concession line, which I think

would have deprived the crown of authority to cause an original survey to be made, I think the case comes clearly within the latter statute. The 26th, 27th and 28th sections, in substance, re-enact the provisions of the statute of 1798, regarding the placing of stone monuments. The 32nd section enacts, "that all boundary lines of townships, cities, towns, villages; all concession lines, governing points, and all boundary lines of concessions, sections, blocks, gores, commons, and all side lines and limits of lots *surveyed*; and all posts or monuments which have been placed or planted at the front angles of any lots or parcels of land; provided the same have been or shall be marked, placed or planted under the authority of the executive government of the late province of Quebec, or of Upper Canada, or under the authority of the executive government of this province—shall be, and the same are hereby declared to be the true and unalterable boundaries of every such township, &c., whether the same shall upon admeasurement be found to contain the exact width, or more or less, expressed in any letters patent, grant or instrument, in respect of such township, &c., mentioned and expressed."

This section appears to be a re-enactment in effect of the statute of 1818; it omits the words "in the first survey," because, as I suppose, the legislature desired to avoid ambiguities which might arise from the use of that term, where cities, towns, villages, &c., had been, or should be erected by proclamation under acts of parliament, but within which the lands had been surveyed, granted and occupied before. I am of opinion that the authority of the executive government refers to strictly legitimate authority, not to assumed authority to interfere with vested rights without the sanction of parliament. I think it was intended simply to give surveys and boundaries placed on the ground legal prevalence over written descriptions; otherwise we should have to give unauthorized acts of the executive government by *ex post facto* interpretation of law, a power of superseding vested rights and estates, which I am satisfied the legislature never intended, and which I think they cannot be construed to intend in a statute which provides by

enactment for the very cases, or at all events for the present case, in which the illegal and mistaken interference of the executive power is argued to be legalized and made good. I think we must seek elsewhere in the statute for a solution of the present difficulty. The 31st section provides for the cases where in townships in Upper Canada, "some of the concession lines, or parts of concession lines, have not been run in the original survey, performed under competent authority, and for cases where the same have been obliterated." In these cases the district council was authorized, upon the application of one-half of the resident landholders in any concession (or without such application if the council should deem it necessary), to make application to the governor, requesting him, under the direction of the commissioner of crown lands, to cause such line to be surveyed and marked by permanent stone boundaries, and the lines so surveyed and marked out shall thereafter be taken and considered to be the permanent boundary lines of such concessions or parts of concessions. This section, I would observe, pre-supposes a species of submission of the difficulty experienced by the landholders concerned to the executive government, or at all events by the council, and an authority is given by statute to cause a survey which may interfere with vested rights. But, besides that this implied consent and positive enactment give the required authority, neither the executive government acting under the statute, nor the courts adjudicating upon the line without such action on the part of the executive are left without binding directions. The 36th section provides that when the line in front of any such concession has not been run in the original survey the division or side lines of the lots in such concession shall be run from the original posts or monuments placed or planted in the rear line thereof, parallel to the governing line determined as aforesaid, to the depth of the concession—that is to the centre of the space contained between the lines in front of the adjacent concessions. Now the line in rear of the concession omitted to be surveyed is one intended to be parallel, though perhaps never strictly so in fact, with the front line of the township, and it is the front line of the

concession in the rear of the one omitted to be surveyed. The effect of this mode of survey is to make the depth of each lot depend upon the distance between the original posts of the lot corresponding in number in front of the concession in rear of the one omitted to be surveyed, and the concession line in front of the concession in front of the one omitted to be surveyed. As the rule is applied to the side line of each lot, and not as governed by a right line, from one end of the concession omitted to be surveyed, and the other end of the same concession, the depth of the lots must therefore determine the position of the concession line omitted to be surveyed in the original survey; and if by reason of incorrect surveying, extraordinary variation of the compass, from local attraction or otherwise, the concession lines actually surveyed in front and rear of the omitted one happen not to be rectilinear, but curved, or otherwise deviating from the right line, it follows that the new line to be ascertained must partake of the deviation of both the lines already ascertained by posts and monuments. The 37th section of the act provides for cases where concessions were surveyed with double fronts—that is to say, where at each side of the allowance for road in front and rear of the concession a line of stakes was planted. By the statute the rear of the concession is made a front to the rear half lots, and the depth of each half lot is determined by halving the distance in the direction of its own lines between the surveyed front and rear of the concession, and thus forbids the notion of a rectilinear division of the half lots in which the township is granted, extending from one end of the concession to the other, unless indeed the lines in front and rear of the concession are themselves right lines. The 38th section provides for the case in the original survey of alternate concession lines, the intermediate ones having been intentionally omitted; here the division or side lines must be drawn from the posts or monuments on each side of such alternate concession lines, to the depth of a concession—that is, to the centre of the space between each alternate concession line. This is in effect the same case provided for in sec. 36, only that for economy in the survey posts are set on each side

of the concession lines actually surveyed; the posts in rear of the concessions numerically in front are made the front posts of the concession, and the half-way point of each line between the alternate lines actually surveyed must be the rear boundary in the rear upon the line not originally surveyed; consequently here must be the allowance for the concession road, whether the same be rectilinear or not.

Thus the statute is all through consistent, not only in its own provisions, but with common justice, and a right division amongst the settlers or land-owners; for the sake of this justice, the convenience of an absolutely straight concession line is given up, as by making the posts *in rear* the *front* of half and whole lots, the possibility of side lines, and consequently of allowances for roads upon side lines being continuous in a straight line, must also be considered as abandoned. A rule directly the reverse of this will be found to prevail regarding side lines. The 39th section provides for the case of the governing side lines not being rectilinear, and the surveyor is then directed to run a straight line from one end of the township line to the other, and to make the side lines of lots in the interior of the township parallel with this right line, and not to follow the curvatures or deviations of the township line. This course of surveying has great conveniences; it simplifies the method of ascertaining the side boundaries of lots, which, were curvatures or deviations of the township line to be followed, so as to make every side line exactly parallel to the township line, would cause great difficulty, expense and uncertainty in the surveys, and expose these lines to be continually disputed. I believe that this method of making a straight line of the governing side line of the township, although apparently authorized for the first time by the enactment in this statute, is not now in practice. I do not remember a case in which deviations from a right line, in the township line on the side from whence the lots were numbered, has been pretended to be followed by a surveyor in producing parallel side lines, and yet, but for this enactment, the question which might be raised on this point would necessarily be one difficult of solution in a court of justice.

The concession lines of townships, with comparatively few exceptions, have been run and staked out in the original survey ; these lines have therefore generally fixed boundaries which prevail over written descriptions, and if these fixed boundaries were adopted in the concessions in front and in rear of the intermediate line omitted to be surveyed, or of which the stakes happened to be obliterated, and if an exactly straight line were adopted for the intermediate concession, we should find great injustice done to many individuals, on one side or the other of the right line. In cases of great deviation like the present, one or the other would be deprived of considerable quantities of land which they had reason to believe their own, while others, without any meritorious ground, would gain these quantities. Side lines, on the contrary, have been fixed only in the first place by the bearings of the compass, and by the statute of 1816 by parallelism with the bearings of the governing side lines of the township ; and when once the direction of the governing line is ascertained, parallel lines produce necessarily equal quantities of land, unless possibly at the beginning or end of the concession, when by reason of deviation or of want of parallelism between the two side lines of the township one of the lots may be deficient, and the other overrun in the rear part. This is a consequence which necessarily flowed from the new survey of side lines in the original surveys, the expense of which would have been multiplied exceedingly by surveys of that nature, and in most instances the loss or inconvenience to individuals is trifling, being only of so much land in the rear and interior of the lot, and not upon the township line on either side, the probable place of building and settlement.

I have always looked upon the provisions of the statute of 1818 as, under the circumstances of the country, indicative of great wisdom and prudence, and I think the statute of 12 Vic. ch. 35 no less a wise and considerate extension of the sense and spirit of the former act, to meet the exigencies of the present time. I should therefore feel very reluctant to forbear applying the enactments of the latter statute to a case to which they are so strictly applicable.

The only difficulty I see arises from the fact of its not being strictly proved, either on the part of the plaintiff or defendant, whether or not at the time of the survey in 1831 grants or locations had been made on the disputed concession line or on the one in rear, so as to give vested rights to individuals with which the government could not legally interfere, and in the assumption insisted upon at the argument, that the government was only doing with land to all intents and purposes its own what it had a right to do when the survey of 1831 was ordered. It would have been more satisfactory, no doubt, as was observed by the learned Chief Justice at the trial, if this fact had been made clear, as it might with little pains have been made. But I think that by the documents put in, it does sufficiently appear that individuals claimed to be interested at the time of these petitions to the executive government in the fixing the locality of the now disputed line. The petitioners state settlement in the township to have taken place as far back as the 8th concession, and it seems to me plain that the government, in ordering the survey of 1831, was acting at the request of some of these settlers and not of its own motion. I therefore do not feel at liberty to set aside the verdict given in this case, which I think accordant with right and justice, merely upon what I conceive to be an improbable surmise, that no subjects of the crown were legally interested in the locality of the line, and that therefore the survey thereof was in the sense of the statute of 1818 an original survey. If the survey of 1831 cannot be considered in that light, then I do not think it for our consideration whether at the time it was made it was according to the law as it then stood or not. The fact of the survey did not alter the rights of individuals, and the statute 12 Vic. ch. 35 does, if necessary, alter these rights by positive enactment. It is probable that, if we had not this act giving us a plain working rule applicable to all similar cases, the locality of the line in question would be fixed according to the plans returned by the surveyor at the time of the original survey and then adopted by the government, unless these were controverted by express words in

letters patent afterwards issued. Even if we had information before us upon which to decide where the line should be, had the statute of 1849 not been passed, it is now wholly unnecessary to give an opinion upon that point. I think that according to that statute, the concession line not having been originally surveyed upon the ground, its locality must now be ascertained at each side line, of the lots in the alternate concessions which were surveyed, and that the allowance for road must be made at the places which are along the line, wherever these side lines, produced from the one surveyed concession line to the other, shall be found to be half way between the two surveyed concessions. If this shall be found (which is not probable) to produce in some places public inconvenience, the remedy is in the hands of the municipal councils, who may straighten or alter the road, without committing injustice towards the landholders.

I am of opinion that the rule should be discharged.

Per Cur.—Rule discharged with costs.

THE QUEEN, AT THE INSTANCE OF JOHN STARK, V. NEHE-
MIAH FORD, ESQ., MAYOR OF HAMILTON.

Criminal information against a justice.

Application for leave to file a *qui tam* information against a judge of a Recorder's Court, upon the grounds that he had falsified the records of the court and maliciously condemned applicant as guilty of a felony upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts to support the application were, that the jury came into court to render their verdict, and the foreman pronounced a verdict of guilty. The counsel of the accused then questioned (not through the court) some of the jury as to the grounds of their verdict, when one of them stated that he did not concur in the verdict. The attention of the court was not drawn to this dissent, nor did it appear they were aware of it. A verdict of guilty was recorded by the presiding judge; and when formally read to the jury by the clerk, no objection was made. The court refused the information.

A rule was granted last Michaelmas term, upon the motion of *Martin*, of counsel for John Stark, calling upon Mr. Ford to shew cause why an information should not be exhibited against him for certain misdemeanors committed by him while presiding as judge of the Recorder's Court of the city of Hamilton, and for then and there wilfully wrongfully, knowingly and maliciously, falsifying the

records of the said court, and for wilfully, wrongfully, knowingly and maliciously, upon the trial of the said John Stark upon an indictment for felony, making a wilful, wrongful and false entry upon the record that the jury found the said Stark guilty of the felony with which he stood indicted, when in truth and in fact the said jury had not found or delivered such verdict, or any verdict whatsoever, and for then adjudging him, said Stark, guilty of the said offence and condemning him to be imprisoned in the common gaol of the said city for two months, and causing him to be imprisoned accordingly.

This rule was ordered in the terms of the notice of application served upon the Mayor, which did not contain the oft-repeated epithets of wilful, wrongful and malicious misconduct, like the present rule; nor did the notice refer to the nature of the indictment, &c., in the same terms. It was however thought by the court to be substantially of no importance, as the grounds of complaint were specified in the affidavits filed in support of the application, although the rule made no reference thereto. They were :

1. The affidavit of John Stark (sworn the 20th Nov. 1852), that he was tried in the Recorder's Court in the city of Hamilton, on the 12th Oct. 1852, upon an indictment for felony—that is, for stealing a cow, the property of Angeline Caroline Girouard, to which he had pleaded not guilty : that Nehemiah Ford, the mayor, presided in the court, assisted by Alderman Davis : that Mr. Martin was his counsel to defend him : that a jury was empaneled and sworn : that after all the evidence was heard and the charge delivered the jury retired to consider of their verdict, and afterwards returned into court, and one of the jury stated that they found deponent guilty ; whereupon Mr. Martin, his counsel, immediately and before the said supposed verdict was recorded, addressed the said jury and asked them upon what grounds they so found deponent guilty ; whereupon one other of the said jurors, viz., George Parkins, immediately and before said supposed verdict was recorded, *stated to the said court that he and four others* of the said jurors did not think him guilty, and did not concur in the

said supposed verdict; whereupon said *Martin*, as such counsel as aforesaid, immediately addressing the said mayor then presiding as aforesaid, and before the said supposed verdict was rendered and before the jury had dispersed, objected and urged upon the said mayor that the said supposed verdict was not in truth and fact a verdict, as the jurors did not agree upon or find any verdict, and that a verdict of guilty should not be recorded against deponent: that nevertheless the said mayor, as so presiding, &c., wholly overruled and disregarded the said objections and reasons so urged by deponent's counsel as aforesaid, and thereupon the said *Martin* then and there requested the said mayor to reserve the said objections for a superior court, which he refused to do, and then and there, as such judge aforesaid, falsely, knowingly and unjustly asserted and entered upon the back of the said indictment, and recorded against deponent, &c., that the jury had then and there, in due form of law, found him guilty of the said felony, and then and there returned to the said court their verdict in said trial that deponent was guilty thereof; and that the said mayor, under pretext of such conviction, then and there wilfully, knowingly and wrongfully committed deponent to close custody in the gaol, and afterwards, during the said court, had him placed in the dock as if found guilty, though not so convicted, and wilfully and maliciously, as deponent had good reason to and did believe, adjudged him guilty of the said felony, although, upon being asked if he had anything to say why judgment should not be pronounced against him, deponent reiterated the objections urged by his counsel, and requested the said mayor to defer the proceedings till the matter was referred to a superior court; yet that said mayor, in an irritated and precipitate manner, wholly refused, and caused deponent to be imprisoned in close custody in the said gaol for two months—not then expired; he also made oath that he was not guilty of the felony of which he stood indicted.

George Parkins, in his affidavit, deposed that he was one of the jury: that he did not assent or agree to the

alleged verdict against said Stark, but thought him not guilty; and that upon the jury being asked by Mr. Martin upon what grounds they found him guilty, he, deponent, immediately, in open court, before the jury dispersed and before any verdict was entered or recorded by the said mayor, informed the said mayor and the court that he as such juror did not agree to find said Stark guilty, but thought him not guilty; whereupon Mr. Martin objected, as alleged in Stark's affidavit, to a verdict being entered against him; but that the said mayor overruled such objections, and asserted that the said alleged verdict of guilty was a good and valid verdict of guilty against said Stark, and entered and recorded it as such against him, as alleged in said Stark's affidavit, and then dismissed the said jury, and directed said Stark to be removed from the dock to prison.

Wm. Acland, a by-stander, made an affidavit that he had read Parkins' and Stark's affidavits, and that the proceedings and circumstances related by the said Parkins in his affidavit to have been transacted and to have taken place in said court upon said trial, were all transacted and took place in the presence and hearing of deponent, and that said Parkins' statements respecting the same were correct.

Arthur Sherry, another juror, made an affidavit that he was one of the four who did not consider Stark guilty, but considered him not guilty, and then proceeded in the same terms as Acland in his affidavit.

John Bryce, another by-stander, made an affidavit similar to Acland's.

There was no affidavit of *Martin*, the counsel of Stark.

Cause was shewn this term by *Read* for the mayor; and he submitted—

1. The affidavit of Mr. Ford (sworn 7th Feb. 1853), that he had carefully read the affidavits filed in this application, and was surprised at the charge made against him; and in the strongest and most explicit terms denied that, in the matter referred to, he was actuated by any improper motives, but was throughout desirous of doing his duty in a fair and impartial manner, without bias or affection for

or towards any person or persons whomsoever: that he and Alderman Davis held the said Recorder's Court, when Stark was tried: that the jury, having retired for some time, returned into court, and, by their foreman, Harvey, returned a verdict of guilty: that thereupon deponent, having indorsed on the indictment the finding of the jury, handed the same to the clerk, who asked the jury, in the ordinary form, to listen to the verdict as the court had recorded it, and that the jury assented thereto: that previously to such verdict being so formally recorded, some conversation in an undertone went on between Mr. Martin, the counsel of the accused, and George Parkins, one of the jury, the nature of which deponent was not aware, but understood it was in answer to an inquiry from Mr. Martin as to the grounds on which they found their verdict; but deponent distinctly denied that any intimation was given to him that the jury had not agreed, nor had he the least idea that there was any dissentient among them; but as he supposed that the inquiry made by Mr. Martin had reference to the grounds on which the jury found their verdict, he made no similar inquiry before the verdict was so formally rendered: that, as he laboured under the infirmity of deafness, some portion of the conversation so carried on may have escaped him, but that he could state positively that no objection was made by the counsel for the accused to the reception of the verdict; nor was deponent aware of any objection until the prisoner was, on the subsequent day, brought up for judgment, and that the jury was unanimous in assenting to the verdict when called upon by the clerk of the court: that he had no previous knowledge of the prisoner, and could not be nor was actuated by any improper motives in the matters so referred to in the affidavits filed.

2. An affidavit of William Harvey, that he was foreman of the jury on the occasion in question: that on retiring to consider of their verdict three or four at first did not agree, but before returning to the court all agreed to return a verdict of guilty, with a recommendation to mercy, and that he did accordingly return such verdict: that between its being

so rendered and the clerk directing them to listen to their verdict as the court had recorded it, George Parkins rose and made some objection to the reception of the verdict, and a conversation in an undertone then took place between Mr. Martin, the prisoner's counsel, and said Parkins: that some conversation also occurred between the said Parkins and others of the jury, the result of which was to remove any scruples he entertained, as deponent supposed, as upon the clerk's reading over the formal finding and indorsement of the verdict, all the jury acquiesced therein, including the said George Parkins.

3. An affidavit of John Edward Start, who had acted as counsel for the prosecution against Stark, stated that he openly acquiesced in the law of larceny, as laid down to the jury by Mr. Martin, the prisoner's counsel: that when the jury retired he left the court, but returned and was present, outside the bar, not in his place, when he heard the foreman deliver into court a verdict of guilty: that he was then engaged in conversation for a few minutes (two or three), when he observed Mr. Martin questioning some of the jurors on the reason of their verdict, and listened to a desultory conversation on the subject, but did not remember hearing any of the juror's say at any time that said Stark was not guilty; and that he was quite positive the verdict of guilty had been rendered by the foreman and recorded before any conversation had passed between any of the jurors and Mr. Martin, and remembered that the mayor reminded Mr. Martin that, as the jurors had rendered their verdict, the case was closed, and that he could not re-examine them.

4. An affidavit of Milton Davis, alderman, and present as such at the said Recorder's Court, corroborated the statements made in Ford's affidavit (having heard it read): that no intimation was given by the jury, or by any person whomsoever, that the jury had not all agreed, and that when the question was formally put by the clerk to the jury, to ascertain if the jury had agreed upon their verdict, there was no dissenting voice on the part of any of the jury, and deponent had no intimation of anything of the sort until the prisoner was subsequently brought up for judgment.

There was no affidavit of the clerk.

Read then objected—

1. That the record ought to be before the court, which it was not (*Rex v. Heber*, 2 Stran. 915); and contended—

2. That the case submitted against the mayor was insufficient: that a prisoner's counsel had no right to interfere irregularly, as had been done in this case: that his conduct was blameable, and his client responsible therefor, and that if blame attached to the applicant it was a good objection to a criminal information at his instance: that the affidavits did not state that four of the jurors dissented, though suggested by Stark's affidavit: that Parkins merely alleged his own objection, and the other jurors who made affidavits corroborated what he stated: that what Mr. Martin said was not stated with sufficient detail and circumstantially, as it ought to have been, to obviate the apparent inconsistency of his interrogating the jury as to the grounds of their verdict and some of them answering that they did not concur therein.—Archbold's Crown Prac. 27; *Ib.* 22; *The King v. Borrow*, 3 M. & A. 432; *The King v. the Justices of Seaford*, 1 W. B. 432; *Rex v. Palmer et al.*, 2 Bur. 1162; *The King v. Davie et al.*, 2 Doug. 588.

3. Finally, he relied on the counter affidavits he produced, as repelling the imputations upon the mayor, and entitling him to a discharge of the rule, with costs.

Martin, in support of the rule, argued—

1. That it was not necessary that the indictment should be removed into this court by *certiorari* or otherwise, or that the conviction entered thereupon should be quashed, or the judgment reversed in error previous to this application.

2. That it was no valid objection to a criminal information, on the grounds urged, that it would in its statements contradict the record so far as respected the formal entry of a verdict of guilty; and that the mayor presiding in the Recorder's Court was entitled to no immunity, and was not, as a privilege of his office and situation, clothed with an inviolability which exempted or secured him from criminal responsibility for gross and corrupt misconduct in the discharge of his duties as a criminal judge; for that if

it were so, the very act that constituted the offence—namely, the false entry of proceedings having taken place that did not take place, would constitute his protection, and the grossest turpitude and oppression might thus be committed with impunity: that the principles upon which criminal informations were granted showed that, however conclusive on all other occasions, the entries of record might be controverted in a proceeding of that kind, as the constitutional and appointed means of punishing corrupt mal-practice in a judge of record in an inferior court. And here he cited numerous cases and authorities, on which he relied as supporting his views.

3. He further contended, that if so, the case was a strong *prima facie* one, and called loudly for the interference of this court, as prayed; and that the affidavits in reply did not fairly meet the charge and the facts specifically stated in the affidavits filed in behalf of the applicant, or repel the case exhibited therein: that a denial of corrupt motives or assertion of *bona fides*, or a mere general denial of the principal facts alleged, or of the mayor having heard what occurred, did not and ought not to be received as satisfactorily rebutting the case of wilful oppression in the recording and perseveringly adhering to a verdict of guilty, though openly dissented to by several of the jury on the instant: that the affidavits in reply did not deny knowledge or intimation of the dissent expressed by some of the jurors, if not before, yet after the verdict had been entered, and in due time to have corrected it, or to have left the case for the further consideration of the jury—citing *Rex v. Parkin*, Moo. C. C. 45; *Danelly v. Hyde*, 6 Jurist, 133; *Regina v. Eagle*, 2 Ju. 62; *The King v. Cozens et al.*, 2 Doug. 427; *The King v. Brooke et al.*, 2 T. R. 190.

MACAULAY, C. J.—The affidavits filed in support of the application do not allege that the members of the court heard the dissent expressed by some of the jurors, or that it was believed they did; and both the Mayor and Mr. Davis positively deny it.

After a careful perusal of the affidavits on both sides, I do not think the court could order a criminal information

upon the case as it now stands before us, even if there were no legal difficulties in the way.

The conversation between Mr. Martin and the jury is stated to have commenced in reference to the grounds of their verdict, which concedes that a verdict of guilty had been pronounced by the foreman. Whether Mr. Martin's interrogations led to any explanations touching the grounds of the verdict does not appear; but it is asserted that they led to open and public expressions of dissent by several of the jurors, and especially by one of them. The members of the court deny having heard the same; and although aware that something was passing between Mr. Martin and some of the jury, and which evidently commenced with inquiries respecting the grounds of the conviction, the Mayor denies having heard, been apprized, or being aware that any want of unanimity existed, or that any dissent had been expressed.

Had the counsel desired to elicit the explanations he wished for through the court, his proceedings would have been regular—the court would have been acquainted with his object, and the attention of the Mayor been directed to the answers or remarks of the jurors. He did not adopt this regular course, but irregularly, while the officer presiding in the court was engaged in entering, in the usual way, the verdict that had undoubtedly been pronounced, addressed himself directly to the jury, and opened a conversation to which the Mayor was not attending and to which he had not been requested to attend. The result was that some of the jury expressed dissent to a verdict of guilty in a way that did not come to the knowledge of the court, the members of which now make oath that they supposed all had concurred, till the present applicant was on a future day brought up for judgment.

That a jury may correct their verdict, or that any of them may withhold assent and express dissent therefrom at any time before it is finally entered and confirmed, is clear from numerous authorities; and the judge presiding over a criminal court cannot be too cautious in being assured that, when a result so serious to the party accused as a

said intestate, according to the tenor and effect thereof. Plea—That after the making of the note the said Biscoe transferred and delivered the said note to the said intestate, for the purpose of having the same collected by and paid to the intestate, as the *attorney and agent* of the said Biscoe, and for no other purpose; and that *after* the said note became due the defendant paid the said intestate as the attorney and agent of the said Biscoe, and he, as such attorney and agent, received and accepted of and from the defendant £5 in full satisfaction and discharge thereof, and of the causes of action on account and in respect thereof. Verification.

Demurrer, on the grounds—1st. That the plea amounted to a traverse or denial of the transfer of the said note to the intestate as in said third count alleged, and should have been so pleaded. 2nd. That it was double in setting up two defences—namely, first, a traverse of the alleged transfer of the note to the intestate; and second, payment and satisfaction thereof to him as the attorney of Biscoe.

The declaration contained six counts on promissory notes and bills of exchange for small sums of money. The seventh, a count for fees due intestate as an attorney; and the eighth, ninth, tenth and eleventh, common counts for money paid, lent, had and received, and on account stated with intestate.—to plaintiff's damage of £200. Plea to the whole declaration: that the intestate was indebted to the defendant in a large sum, to wit, £250, being an amount due and unpaid upon a judgment, to wit, on the 18th of July 1850, recovered in the court of Queen's Bench, Upper Canada, by the defendant against the said intestate, in an action on promises, for £138 5s. 7d. for damages and costs, as by the record, &c., appears, and which he is ready to verify by the record; which sum of money so due to the defendant as aforesaid exceeds the damages sustained by the plaintiff by reason of the non-performance of the promises in the declaration mentioned, and out of which sums of money due to the defendant he is ready and willing and offers to set off and allow to the plaintiff the full amount of the damages, according to the statute.

Verification. Demurrer, on the grounds of inconsistency in alleging that the plaintiff was indebted to the defendant in £250 upon a judgment recovered for a less sum : that the amount of the judgment being less than the damages of the plaintiff, as set forth in the declaration, was improperly pleaded in bar, or as a set off to the full extent of said damages.

Eccles, for the plaintiff, contended—

1st. That the replication *de injuria* to the second plea was good on the authority of *Muttlebury v. Hornby*, 6 U. C. R. 61 ; and *Brooke v. McCausland*, 6 U. C. R. 104.

2nd. That the sixth plea was an argumentative traverse of the alleged transfer and delivery, and double in setting up payment in addition thereto.

3rd. That the eleventh plea was bad, for the reasons assigned—*Jarvis et al. v. Dickson*, 3 & 4 Vic., Q. B. U. C., not reported, see *Rob. & Har. Dig.* “Set off,” 6 ; *Mee et al. v. Tomlinson*, 4 A. & E. 262 ; *Amor v. Cuthberth*, 3 M. & G. 1.

That the plaintiff could not reply thereto ; a *nul tiel* record would only put in issue the alleged judgment, with an implied admission of the larger amount stated to be due thereon, if such a judgment was proved of record.

A. Crooks contended—

1st. That the 2nd plea was matter of discharge, and differed from the cases cited in the more complete statement of facts : that the present note was payable to *bearer*, not transferable by indorsement ; and that being paid at maturity the promise was fulfilled and the note no longer capable of imparting a right of action by subsequent delivery—*Chitty Junr. Plg.*, Forms 303 ; for cases on the point—*Barns v. Price*, 1 C. B. 214.

2nd. As to the 6th plea he referred to *Lloyd v. Howard*, 20 L. J. Q. B. 1, as supporting it ; and 3 *Chitty Junr. Forms*, for a precedent of a similar kind.

3rd. As to the 11th plea, that the amount really due depended on the proof ; and if counterbalanced by the judgment it would be a good defence, and so the plea good—*Chitty Junr.*, Forms 389, and notes ; *Barnes et al. v. Butcher*, 9 C. & P. 725.

That Mee et al. v. Tomlinson differs in the facts as pleaded.

MACAULAY, C. J.—If a promissory note payable to bearer is, after being due and payable, transferable by delivery, as one payable to order is by indorsement, as I think it is, then I consider the case governed by Muttleberry v. Hornby (6 U. C. R. 61), and that *de injuria* is well replied to the second plea, as being in excuse. It is in one sense a plea in discharge—that is, discharge of the debt by payment to a prior holder; but it is not a plea in discharge of the call for payment made in this action by the plaintiff, as the present holder, and who states a *prima facie* case entitling him thereto; as to him, it is matter of excuse for not paying him according to the implied promise involved in such *prima facie* case, because the defendant had previously paid the amount to a party entitled to receive the same, thereby showing, that although the note was left outstanding, it had been satisfied, and that being transferred to plaintiff after being due and paid, the defendant was excused from paying it over again—in other words, from performing the implied or *prima facie* promise which the facts stated in the declaration, none of which are traversed or denied, import—Robinson v Little, (13 Jur. 149, 9 Q. B. 602), Bell v Ingestre, (12 Q. B. 318,) Talhurst v. Notley, (11 Q. B. 406), Williams v. James, (15 Q. B. 500), Lloyd v. Howard, 3rd plea and point, (15 Q. B. 995), Catterall v. Lees, (8 C. B. 113).

It is not contended that it is a plea in denial, but it is as much an argumentative denial of a valid transfer of the note, as in discharge of it. As a plea in discharge, it would affirm performance of the binding promise to pay by payment to a prior holder, as, in denial, it would deny a transfer valid in law, whatever it might be in form; because the debt had been paid, the note extinguished, and the promise to pay fulfilled and at an end, wherefore nothing passed to the plaintiff in point of legal interest by the transfer made to him. It is certainly a plea in excuse of the promise implied on the face of the declaration, and of the payment demanded in this action. It shows that in law

no such cause of action as that alleged ever accrued or existed—*Catterall v. Lees*, (8 C. B. 115, Maul, J.)

2. The 6th plea is an informal plea of payment, and seeks to put in issue additional facts not admissible. It admits a transfer and delivery of the note to the intestate, but not absolutely. It seeks to qualify it, to the special purpose of an agency to collect for Biscoe. It does not therefore confess or avoid that part of the third count. It may be said it gives colour. Then it proceeds to allege a payment to the intestate, not as an absolute holder, but as agent and attorney of Biscoe, thereby seeking to bind the plaintiff to admit or deny such agency, and making that a part of the defence; for, irrespective of it, the transfer and payment are both alleged to the intestate. Now, whether he held the note or was paid the amount as agent or attorney of Biscoe or not, is immaterial, and a traverse of such agency would raise an immaterial issue; unless, therefore, all those portions of the plea which relate to such agency can be rejected as surplusage, the plea is bad. These portions are no doubt irrelevant; but, combined as they are with the confession of the transfer, and the assertion of payment, they appear to me inseparable on this demurrer, and to render the plea bad, as seeking to make material and put in issue facts that cannot be made to constitute part of a plea of payment, which this is. If paid to the intestate as agent of Biscoe, that may be shown in any proceeding in which it may be material. It is not on this plea shewn to be material, and I think exposes it to the demurrer, which must therefore prevail. It is the reverse of the case of *Bennison et al. v. Thelwell*, (7 M. & W. 512). There the defendant pleaded that he by his agent paid the plaintiff. Here the defendant alleges that *he* himself paid the plaintiff's intestate as agent of another. It is not alleged the defendant had any set-off against Biscoe, if that would have availed to render the plea good.

3rd. The cases of *Mee et al. v. Tomlinson*—7th plea—(4 A. & E. 262), *Amor v. Cuthbert* (3 M. & G. 1), are not precisely like the present case; but I think the plea bad, not on the ground that in the commencement it does not name a sum

sufficient to cover the whole damages as laid in the declaration, for it does so and more ; but in stating the subject of the set-off it only mentions a judgment recovered for a less sum than the claim laid in the declaration, without showing how a greater sum was due thereon. Would it be sufficient to plead a promissory note for a like amount as a set-off, under similar circumstances? I should think not. It is possible the sum first stated (£250) was then due on the judgment, including interest &c., but if so, it should be so alleged ; so far as appears, it is not so—and if not repugnant, it is a defective statement of the subject of the set-off, a set off defectively stated ; and as a plea in bar of the whole action, and not restricted to the amount shewn to be recovered and due, bad on demurrer.—Noel v. Davis, (4 M. & W. 136), Fairthorne v Donald, (13 W. & W. 424).

McLEAN, J.—Upon the demurrer to these pleas I think the plaintiff is entitled to succeed—the sixth plea *indirectly* traverses the transfer of the promissory note mentioned in it to Hy. Wm. Blackstone, so that he could be the bearer or holder of it as alleged in the declaration : it admits that Biscoe *transferred* and *delivered* the note to Hy. Wm. Blackstone, but states that it was transferred and delivered for the purpose of being collected. If defendant meant to deny the assignment of the note by delivery to Blackstone, he should have pleaded so in direct terms, so that issue could be taken on that fact. Then in the same plea, which indirectly traverses the delivery, the defendant alleges that he has paid the amount to Blackstone as the attorney of Biscoe, thus including in one plea two distinct defences. If Blackstone was not the holder of the note as his own, his administratrix, on that fact being shewn, could not recover. Then again, if the amount was paid to him either as attorney or as the bearer, under a plea of payment, if the fact were proved, the plaintiff must fail : the plea is therefore bad.

The eleventh plea alleges an indebtedness by the intestate of £250 on a judgment recovered for £138 5s. 7d.; and that the defendant offers to allow the whole amount of damages to be deducted from the said sum of *money so due* and owing to the defendant. It is clear that a judgment

for £138 5s. 7d., cannot satisfy £200, at which the plaintiff's damages are laid; and the defendant states in the commencement of his plea that the intestate owed him, *and still owes* him £250; he does not shew how that amount was due, so that the plaintiff's damages could be covered by it. The judgment should have been pleaded as a set-off to so much of plaintiff's damages as it would cover, with an allegation that plaintiff's damages, by reason of the defendant's breach of promise, do not exceed the amount.

To the first count of the declaration, which is on a promissory note of defendant, made to Thomas Crisp or bearer, the defendant's second plea is, that the note was not delivered, transferred and assigned to Hy. Wm. Blackstone till after it became due, according to its tenor and effect: that when it became due it was in the hands of Thomas Crisp as the lawful owner and holder thereof, and that before it became due defendant paid to Thomas Crisp the full amount of the said promissory note in full satisfaction and discharge of the amount and of all causes of action in respect thereof. The plaintiff has replied *de injuria* to this plea; and the defendant demurs to the replication, because it purports to deny the excuse set up by the plea, whereas no excuse for non-payment of the promissory note is alleged therein, but matter in payment and discharge thereof: that the replication is not admissible to a plea shewing a matter in discharge and not in excuse of the defendant's liability as the maker of the promissory note in the first count mentioned.

The cases of *Muttlebury v. Hornby* (9 U. C. Rep. 61), and *Brooke v. McCausland*, same vol, page 104, are authorities in favor of this replication; and, as I have seen no reason to change my opinion since the decision of these cases, I must consider the replication good.

SULLIVAN, J., concurred.

Per Cur.—Judgment for the demurrer.

THE QUEEN v. JOHN MOWAT.

Pork Inspector—His duty—Pleadings.

Sci. fa. on a bond to the Queen for performance of duty by a pork inspector. Plea set out the condition, and then averred performance. Assignment of breaches shewed an agreement to refer pork to the inspector for his inspection, and then alleged that he *wrongfully* branded pork of inferior quality with the words "prime mess pork," &c., contrary to the form of the statute, and contrary to his duty. Demurrer, that the replication did not allege that the acts of the inspector complained of were *breaches of his duty*, or were done by him *knowingly, willingly, or designedly*, or that he did not in respect of such matters use the best of his *skill, judgment and ability*. *Held*, on the facts alleged in the assignment of breaches, and assuming them to be true, as alleged, that the bond was forfeited.

Sci. fa. on a bond to the Queen.

Victoria by the Grace of God, &c.

To the sheriff of the United Counties of Frontenac, Lenox and Addington—*Greeting* :

"Whereas, John Mowat, by his bond, sealed with his seal, made on the twenty-seventh day of July in the year of our Lord, one thousand eight hundred and forty-three, and in the seventh year of our reign, became bound to us, our heirs and successors, in the sum of two hundred and fifty pounds of lawful money of the province of Canada, payable at a day past, which sum he hath not yet paid or caused to be paid to us, as we are informed, and we being desirous to be satisfied the sum with all the speed we can, as is just, do command you that by good and lawful men of your united counties, you give notice to the said John Mowat that he be and appear before the justices of our court of Common Pleas, at Toronto, on the last day of this present Trinity Term, to shew cause, if he can, why we should not have execution against him for the said sum of two hundred and fifty pounds, and that you then return there the names of those persons by whom you shall have caused such notice to be given, and this writ. Witness, &c."

To this *sci. fa.* the defendant, by John A. Macdonald, his attorney, pleaded that execution ought not to be adjudged to our said lady the Queen against him for the said sum of two hundred and fifty pounds, as aforesaid, because he said that the said bond was at the time of the execution thereof, and was then, at the time of plea pleaded, subject to a certain condition thereunder written; and that the said bond and the said condition so thereunder written, were in the words following, that is to say :—

"Know all men by these presents, that we, Oliver Mowat, of the town of Kingston, in the Midland District, and province of Canada, inspector of beef and pork; John Mowat, of the same place, esquire; and Charles Heath, of the same place, druggist; are held

and firmly bound unto our sovereign lady the Queen, her heirs and successors, in the penal sum of seven hundred and fifty pounds of good and lawful money of the province of Canada, that is to say, the said Oliver Mowat in the sum of two hundred and fifty pounds, the said John Mowat in the sum of two hundred and fifty pounds, and the said Charles Heath in the sum of two hundred and fifty pounds, of like good and lawful money, to be paid to our sovereign lady the Queen, her heirs and successors; for which payment well and truly to be made, we bind ourselves, and each of us severally, and not each for the other, our, and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this twenty-seventh day of July in the year of our Lord one thousand eight hundred and forty-three.

"Whereas the above bounden Oliver Mowat hath been appointed to the office of inspector of beef and pork for the said town of Kingston.

"Now the condition of this obligation is such, that if the said Oliver Mowat shall in all things well and truly fulfil and discharge his duty as such inspector of beef and pork according to law, then this obligation to be null and void, otherwise to remain in full force and effect."

The plea then averred that he, the said Oliver Mowat, did in all things well and truly fulfil and discharge his duty as such inspector of beef and pork, according to law, and according to the tenor and effect of the said condition of the said bond. Verification. Wherefore he prayed, &c.

The *Attorney General, pro Regina*, then suggested as follows:—That our said lady the Queen, by reason of anything in that plea alleged, ought not to be barred, &c., because that the said Oliver Mowat continued in the said office of inspector of beef and pork, in the said bond mentioned, and from the date of the making of the said bond for a long space of time, until, to wit, the first day of August, in the year of our Lord one thousand eight hundred and fifty one—to wit, at the city of Kingston, in the county of Frontenac, one of the united counties of Frontenac, Lenox and Addington, to wit, at the city of Toronto, in the county of York, one of the united counties of York, Ontario and Peel; and that after the date and making of the said bond, and while the said Oliver Mowat continued in the said office, certain persons, to wit, John Pollock, Arthur Pollock, Allan Gilmour, Robert Rankin, John Gilmour, David Gilmour, James Gilmour, and Allan Gilmour, had agreed with one Archibald McFaul for the

purchase from him, the said Archibald McFaul, of a certain quantity of pork, packed in barrels, to wit, four hundred barrels of pork, of which he, the said Archibald McFaul was then and there possessed, at certain prices, to be paid by them to the said Archibald McFaul therefor—that is to say, at the rate and price of three pounds and ten shillings for each and every barrel of mess pork of the said quantity of pork and at the rate and price of two pounds and fifteen shillings for every barrel of prime mess pork, of the said quantity of pork ; and at the rate and price of two pounds and ten shillings for every barrel of prime pork, of the said quantity of pork ; and that the said pork should be subject to inspection at Kingston, aforesaid ; and that it was afterwards, to wit, on the day and year last aforesaid, at the city of Kingston aforesaid, in the county of Frontenac aforesaid, one of the united counties aforesaid, to wit, at the city of Toronto, in the county of York, one of the united counties of York, Ontario and Peel, further mutually agreed by and between the said parties respectively, that the said certain quantity of pork, to wit, the said four hundred barrels of pork, should be submitted to the said Oliver Mowat, as such inspector as aforesaid, for inspection thereof by the said Oliver Mowat as such inspector, pursuant to the statutes in that case made and provided ; and further, that afterwards, to wit, on the day and year last aforesaid, and within the limits of the said town of Kingston, now the city of Kingston, aforesaid, to wit, at the city of Kingston aforesaid, in the county of Frontenac, one of the united counties of Frontenac, Lenox and Addington, to wit, at the city of Toronto, in the county of York, one of the united counties of York Ontario and Peel, in pursuance of the said agreement, the said quantity of pork, consisting of, to wit, four hundred barrels of pork, was by the said parties duly submitted to the said Oliver Mowat, as such inspector as aforesaid, for inspection thereof, according to the statutes in that case made and provided ; and that the said Oliver Mowat then and there, as such inspector as aforesaid, and within the limits of the said town of Kingston, now the city of

Kingston, and while he continued such inspector as aforesaid, and while the said bond continued in full force and effect, and before the commencement of this suit, accepted the said quantity of pork, to wit, the said four hundred barrels of pork, for inspection thereof, according to the statutes in that case made and provided, and entered upon the inspection of, and inspected the said pork, and completed his inspection of the same, and upon such inspection pronounced a large part, to wit, three hundred and thirty-four barrels of the said pork, to be prime mess pork, and of sound and merchantable quality, and then and there branded the said part of the said pork—to wit, the said three hundred and thirty-four barrels of pork, as prime mess pork, by branding on one of the heads of each of the said three hundred and thirty-four barrels in which the said pork so branded was packed the words “prime mess pork. O. Mowat, inspector.” And further, that the said Oliver Mowat did not in all things well and truly fulfil and discharge his duty as such inspector of beef and pork as aforesaid, according to law, in this—that is to say, that at the time the said pork, branded prime mess pork as aforesaid, was submitted to the said Oliver Mowat for inspection as aforesaid; and also at the time the same was inspected and branded as aforesaid, a large quantity and number of the said barrels of pork branded prime mess pork as aforesaid, to wit, one hundred and sixty-four barrels, was not prime mess pork, but consisted of and contained only a quality and sort of pork inferior to and of less value than prime mess pork—that is to say, part thereof prime pork, part thereof large pork, and part thereof only the coarse pieces of hogs; and also a certain other large quantity and number of the said barrels of pork branded prime mess pork, to wit, one hundred and seventy barrels of the said pork, at the time the same was submitted to the said Oliver Mowat for inspection as aforesaid, and also at the time the same was so inspected and branded as aforesaid, consisted of soft pork, and pork of an unsound and unmerchantable quality, arising from other causes than being soft, or still fed—that is to say, part thereof being

rusty, and other part thereof tainted, and other part thereof sour, and other part thereof boar pork—to wit, at the city of Kingston, in the county of Frontenac, one of the united counties of Frontenac, Lenox and Addington—to wit, at the city of Toronto, in the county of York, one of the united counties of York, Ontario and Peel. Yet, the said Oliver Mowat, on or after such inspection as aforesaid, did not, nor would brand, or cause to be branded on either of the heads, or any other part of the said barrel, or any of them containing the said inferior quality and sort of pork as aforesaid, to wit, the said one hundred and sixty-four barrels, the true quality or sort of such pork; and did not, nor would brand, or cause to be branded on either of the heads, or on any part of the said barrels, or any of them containing the said soft pork, and the said pork of an unsound and unmerchantable quality as aforesaid, the word “soft,” or the word “rejected,” although a reasonable time for so doing had elapsed before the completion of the purchase of the said pork and payment of the purchase money for the same, as hereinafter mentioned, but wrongfully branded all the said barrels containing the said pork of inferior sort and quality, to wit, the said one hundred and sixty-four barrels; and also the barrels containing the said soft pork, and the said pork of an unsound and unmerchantable quality aforesaid, with the words “prime mess pork,” contrary to the form of the statute in such case made and provided, and contrary to his duty as such inspector as aforesaid—to wit, at the city of Kingston, in the county of Frontenac, one of the united counties of Frontenac, Lenox and Addington—to wit, at the city of Toronto, in the county of York, one of the united counties of York, Ontario and Peel; and further, that the said John Pollock, Arthur Pollock, Allan Gilmour, Robert Rankin, John Gilmour, David Gilmour, James Gilmour and Allan Gilmour, after the inspection and branding of the said pork as aforesaid, confiding and relying in and upon the same, and the correctness thereof, and having no knowledge or notice that the said pork, or any part thereof, was of any other or different sort or quality than was indicated by the

said branding, or was soft, or of an unsound or unmerchantable quality as aforesaid, after the inspection and branding of the said pork as aforesaid, and while the said Oliver Mowat continued in the said office, and before the commencement of this suit, to wit, on the day and year last aforesaid, to wit, at the city of Kingston, in the county of Frontenac, one of the united counties of York, Ontario and Peel, completed the said purchase, and purchased from the said Archibald McFaul, as and for prime mess pork, and as of a sound and merchantable quality, the said quantity of pork so branded prime mess pork as aforesaid, to wit, the said three hundred and thirty-four barrels, and paid the said Archibald McFaul for the same at the rate and price as aforesaid agreed upon in that behalf—that is to say, at the rate and price of two pounds and fifteen shillings per barrel, which otherwise they would not have done; whereby, and by reason of which breach of duty, and of the condition of the said bond, the said John Pollock, Arthur Pollock, Allan Gilmour, Robert Rankin, John Gilmour, David Gilmour, James Gilmour, and Allan Gilmour, being the parties for whose benefit this action is brought and proceeded with, then and there, and before the commencement of this suit, sustained loss and damage to a large amount, to wit, to the amount of six hundred pounds, and became, and are aggrieved; and were also forced and obliged to get, and did get, the said pork re-inspected, and necessarily expended a large sum of money, to wit, one hundred pounds, in getting the said pork re-inspected. Verification. Wherefore the Attorney General prayed judgment, &c.

To this replication the defendant demurred, for the following causes:—That it was not averred or stated in the said replications, or any of them, that the acts of the said Oliver Mowat therein respectively complained of, or any of them, or the breaches of duty therein alleged, or any of them, were or was done, committed, or omitted by him, the said Oliver Mowat, knowingly, wilfully, or designedly; or that the said Oliver Mowat did not in, and in respect of such matters, or each of them, use the best of his skill,

ever who shall or may be aggrieved by any breach of the conditions thereof; and by sec. 4, every person shall be entitled to have communication and copy of any such bond, &c. Sec. 6 requires the inspector to take an oath of office that *he will faithfully, truly and impartially, to the best of his judgment, skill and understanding*, do and perform the office of such inspector according to the true intent and meaning of the statute, and that he would not directly or indirectly brand or suffer to be branded any cask or half cask of beef or pork, but such as should be sound and good, and of the quality designated by such brand, and with regard to which all the other requirements of the said act should have been complied with to the best of his knowledge. Sec. 10 requires the inspectors to cut up, salt, pack and cure, or if already packed, to unpack and examine throughout, adding salt if necessary and cooping up the same, &c., every barrel of pork &c., submitted to them for inspection. Sec. 11 requires them to have brands where-with they shall brand immediately after inspection every barrel &c., of beef or pork—"Toronto," "Kingston," or the place for which appointed, and the initial of the christian name and the surname at full length, of such inspector, with the quality as afterwards directed, and that every barrel &c., which *may* on inspection be *found* to be soft or still-fed, &c., shall be branded "soft," in addition to the brand designating the quality; and in all cases when beef or pork shall be *found* of unsound and unmerchantable quality arising from other causes, the same shall be branded with the word "*Rejected*;" and in all cases when beef or pork *may appear* inferior to the mark of the packer, or of any former inspector, the same shall be erased; and as soon as any beef or pork is inspected, the inspector shall certify the quantities and qualities *ascertained* by inspection, and the charges thereof, according to the rates therein authorized; and if any inspector shall *knowingly* and *wilfully* give an untrue or incorrect certificate of the quantity or quality of any beef or pork by him inspected or without personal inspection, &c., he shall incur a penalty of £20 for each offence, and be dismissed from his office, and be ever

after disqualified ; *Provided*, that in all cases where any beef or pork shall have been sold subject to inspection, the person applying to the inspector to inspect shall be entitled to reimbursement of the price of inspection from the vendor, if not himself vendor, unless otherwise expressly agreed at the time of sale or of the *agreement* to submit the beef or pork to inspection ; *Provided also*, that any such *agreement* shall *imply a warranty* that all the requirements of this act have been complied with, as well with regard to the provisions to which it relates as to the vessels in which they are contained and the marks upon such vessels. Sec. 12 requires brands to be large and legible, within a space of 14 inches, and the inspector to govern himself so far as may be possible by one uniform standard of quality for each description of beef and pork, &c. Secs. 14 and 15 prescribe certain duties. Sec. 16 provides for referring disputes between the inspector and owner respecting the quality or condition, or relating in any respect to beef or pork by him inspected, to three persons of skill and integrity to be appointed as therein provided, whose decision under oath shall be final. Sec. 18 enacts that on the head of any barrel, &c., containing any thin, rusty, measley, tainted, sour, or unmerchantable pork, &c., branded "*rejected*," in consequence, the quality and condition thereof shall be marked in black paint, with further regulations respecting the certifying, &c., the state and condition of pork inspected, &c. Sec. 19 prescribes the materials, size and construction of barrels, &c., used for packing beef and pork, and prohibits the branding of any others. Sec. 21 provides for the classification of beef ; Sec. 22, of pork, enacting that all pork which an inspector shall find on *examination* to be fat or merchantable, shall be cut in pieces as nearly square as may be, and not exceeding 6 lbs. nor less than 4 lbs. weight, and shall be sorted and divided into four different sorts, to be denominated "Mess"—"Prime Mess"—"Prime" and "Cargo Pork :"—Mess pork shall consist of the rib pieces only of good hogs not weighing less than 200 lbs. each, to be branded "Mess Pork." Prime mess pork shall consist of the pieces of good fat hogs of not less than

190 lbs. weight each, the barrel to contain the coarse pieces of one hog only, that is to say—two half heads, not exceeding together 16 lbs. weight, with two shoulders and two hams, and the remaining pieces of a hog, to be branded “Prime Mess Pork.” Prime pork shall consist of the pieces of good fat hogs of not less than 150 lbs. weight, the barrel to contain the coarse pieces of one hog and a half only,—i. e., 3 half heads (not exceeding 24 lbs.), 3 hams and 3 shoulders, and the remaining pieces of a hog and a half hog, to be branded “Prime Pork.” Cargo pork to consist of the pieces of fat hogs, of not less than 100 lbs. weight, the barrel to contain the coarse pieces of not more than 2 hogs,—i. e., 4 half heads (not exceeding 30 lbs.), 4 shoulders, 4 hams, and the remaining pieces of 2 hogs, and shall be otherwise merchantable pork, to be branded “Cargo Pork,” with other provisions for tierces of pork, on the same scale. But in all cases shall be cut off the ears close to the head, the snout above the tusks, the legs above the knee joint, and the tail, and the brains, tongue and bloody grizzle taken out; each barrel to contain 200 lbs., and each tierce 300 lbs.

The breach of duty assigned in substance is that Messrs. Pollock & Company agreed to purchase a large quantity of pork in barrels from McFaul, at specified prices according to the quality, and that such quality should be ascertained by the inspection of Oliver Mowat, to whom it was agreed to be and was submitted for inspection: that of this pork, having inspected the same, he pronounced 334 barrels thereof to be prime mess pork and of sound and merchantable quality, whereas 164 barrels thereof were not prime mess pork, but were only part thereof prime pork, part cargo pork, and part only coarse pieces of hogs, and 170 barrels (a residue of the 334) consisted of soft pork and unsound pork, being part rusty, part tainted, part sour, and part boar pork; and yet that the inspector did not nor would brand the same accordingly, but *wrongfully* branded the whole of the said 334 barrels *prime mess pork*, contrary to the statute and contrary to his duty, and that the purchasers (on whose behalf, as aggrieved parties, these

proceedings are prosecuted) not knowing the contrary, and relying upon such inspector's brands, completed the purchase, and paid for the said 334 barrels at the rate agreed upon for prime mess pork, and afterwards sustained great losses, damages, &c. ; and so the said inspector did not in all things well and truly fulfil and discharge his duty as such inspector of beef and pork according to law.

Now, adverting to the provisos at the end of the 11th section of the act, and to the 22d section, if the implied warranty mentioned in the 11th section means *by the inspector*, (as I am disposed to think it does to both vendor and vendee), and the word "agreement" in the last proviso means agreement to submit to inspection, executed and certified by the inspector's brands, the force of his obligations is more pointedly shewn. But if not, still, confining attention to the 22d section, classifying the different qualities of pork, and then comparing the breaches assigned therewith, it will be seen that the defects in quality are in a great measure alleged to have been obvious and glaring, and not depending upon skill or judgment, as to the fatness, weight, or soundness of the meat; but in the numbers of heads, shoulders, hams, &c., and if true, a manifest dereliction on the part of the inspector; and when it is alleged that he would not brand the barrels truly but wrongfully branded them incorrectly, whereby the purchasers were subjected to great loss and prejudice, I apprehend that if that be true, it does sufficiently appear that he did not fulfil his duty according to law. Upon a traverse of the alleged breaches of duty, it must of course depend upon the evidence whether they were in fact committed. The case may appear very palpable, or it may present a nice balancing question touching appearances, about which persons conversant with the subject might reasonably differ. The inspector's conduct may appear grossly negligent, if no worse, or it may appear that he acted *bona fide*, and with a reasonable judgment and due discrimination. It may be a question more or less of degree; but, alleged as the facts are in the assignment of breaches, and assuming their truth as alleged, I cannot but regard the inspector as having violated his duty, and, being wanting therein, to have forfeited his bond.

Without dwelling upon the usual force and effect of fidelity bonds, or attempting to define what will constitute a breach of duty in point of technical allegation in pleading, as distinguished from evidence thereof, I will merely observe that the office in question is one voluntarily sought or assumed, not forced on the party by law, and that when in performing a duty so undertaken he *wrongfully* executes it, the force of that word alone implies a breach of such duty.—*Drewe v Coulton*, (1 East. 563), *Bromage et al. v. Prosser* (4 B. & C. 255).

It is a term of common use ; the new rules speak of the *wrongful act* alleged ; the replication of *de injuria* is a familiar instance of its use and its import—*Barnford et al. v. Iles et al.* (3 Ex. R. 380), *Melville et al. v. Doidge*, (6 C. B. 450), *Reg. v. Ellis* (4 Ex. R. 650), *Ellis v. Reg.* (15 Jur. 917), *Frankum v. Lord Falmouth* (2 A. & E. 452), *Renshaw v. Bean* (21 L. J. Q. B. 219, 10 Am. Eng. Rep. 417, 423).

Had the inspector been specially appointed by the vendees of this pork, and undertaken to inspect and brand the same according to the statute, and given them a bond reciting his special appointment, *pro hac vice*, with a condition to perform his duty to them in the premises, in terms equally formal and comprehensive with the present bond, and had afterwards *wrongfully* branded the barrels as alleged in this case, I cannot but think it would be a breach of his bond, and that his surety therein would be liable for such breach ; if so, similar conduct in the particular instance for which he was selected and entrusted is equally a breach of the present bond, which extends to all inspections instead of one alone. And the surety is liable for every breach committed under this bond, as he would in the particular instance, under the supposed one ; at least it so appears to me. The facts stated shew culpability or dereliction on the face of them, and adding the charge of negligence thereto, would not enhance their force ; if done wilfully, other penalties would be incurred by the inspector, besides the breach of the bond.

McLEAN, J. and SULLIVAN, J. concurred.

Per Cw.—Judgment for plaintiff.

IN THE MATTER OF GABRIEL HAWK AND GEO. BALLARD,
TOWN CLERK OF THE MUNICIPAL COUNCIL OF THE
TOWNSHIP OF WELLESLEY.

Election of Township Reeve—Validity thereof—Mandamus.

At an election of township councillors, the person who acted as returning officer for one of the five wards was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, *without taking the oath of office*, proceeded to elect the reeve: *Held*, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election: *Held also*, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being within the meaning of the Municipal Council Act, "on entry upon their duties." A mandamus applied for by the reeve thus elected was therefore refused.

In Hilary Term last *Irving* obtained a rule upon George Ballard, to shew cause why a mandamus should not issue directing him, as Town Clerk of the Municipal Council of the Township of Wellesley, to issue a certificate under his hand and seal, as such clerk, that the said Gabriel Hawk had been duly elected Town Reeve of the Municipal Council of the said township, and of his having taken the oath of qualification and office as such Town Reeve.

The affidavit of Hawk, on which this rule was granted, represented that, on Monday the 3rd January last, he was elected township councillor for ward No. 3 in the aforesaid township; and that, on Monday the 17th January last, when the newly elected councillors met to elect a town reeve for this year, he took and subscribed the oath of qualification for the office of township councillor, together with three other newly elected councillors, before John Hawk, the then reeve; and that the said oath, duly certified, was deposited with said Ballard, the town clerk; and that thereupon the four newly elected councillors (naming them), including himself, proceeded to business. The fifth person, who pretended to be a councillor (Wilson) not sitting, by reason of no return from the returning officer authorized to hold the election, another of the same name having held it: that one of the said councillors (Zaeger) proposed another (Isbach) for reeve; not seconded: that another (Percifer Hawk) then proposed said Gabriel Hawk for reeve, who seconded his own nomination; when Isbach

seconded Zaeger, which caused a tie ; and that he, said Gabriel Hawk, appearing highest on the assessment roll for the preceding year, gave a second or casting vote in his own favor, and became elected reeve : that no further business was done : that he, on the 22nd January following, took and subscribed the oath of office as such reeve, before John Hawk, the reeve for the previous year, and authorized as such to administer such oath ; and which oath, duly subscribed and certified, was, on the same day, deposited with the said Ballard : that on Monday the 24th January, he sent to the said Ballard for the certificate that he had been elected reeve and had taken the oaths of qualification and of office as such, to be produced at the county council, as required by law ; but that the said clerk refused the same : that on the 24th January he was refused admittance into the county council for want of the said certificate : that, on Monday the 31st January, he applied personally to the said clerk therefor, but he refused to give it.

Read shewed cause, and filed an affidavit of George Ballard, representing that he attended the meeting of town councillors elect, on Monday the 17th January. The five were present ; but one of them (John Wilson) was objected to by the chairman, Gabriel Hawk, and one other of the councillors, as not duly elected for ward No. 4, because the Robert Robertson who held the election was not the Robert Robertson who had been appointed returning officer : that on that occasion John Hawk, the reeve of the previous year, presided as chairman, and thereupon administered the oath of qualification to the other four councillors, exclusive of Wilson ; but that no oath of office was then taken by any of them, nor at any time previous : that the election of reeve took place as stated by Gabriel Hawk : that by one councillor proposing him, he seconding himself, and giving a second or casting vote in his favor, while opposed to him were the two others, one of whom likewise insisted upon giving a double vote and to create a tie, which led to much dispute and contention ; and the two opposed to Gabriel Hawk insisted upon Wilson's admission to vote as councillor for ward No. 4,

which the ex-reeve and Gabriel and Percifer Hawk resisted; and that during the confusion and discussion Gabriel Hawk stated his belief that he was highest on the collector's roll and had the casting vote, and would vote himself reeve: that the meeting broke up in confusion; and in consequence of the oath of office not having been taken by the said councillors, as well as the way the election had been carried on, he declined giving the certificate, considering the proceedings illegal and most unfair: that on Saturday, the 22nd of January, he mentioned to Gabriel Hawk that neither he nor the other councillors had taken the oath of office, and at his request drew a copy of one, which he took away, and in half an hour afterwards returned, certified to be sworn before John Hawk, the ex-reeve. It was annexed to the affidavit, and on the face of it purported in the jurat to have been sworn on the 17th of January, although it could only have been really sworn upon the 22nd: that the reeve of the previous year addressed the people present at the meeting on the 17th, and resigned his seat as reeve: that he considered himself justified in withholding the certificate, not deeming John Hawk competent to administer the oath of office to Gabriel Hawk, and by reason of the attempt to impose by the insertion of the 17th, instead of the true date, in the jurat; and that he acted conscientiously and impartially, &c.

So the facts appeared to be—

1. That five councillors were elected.
2. That the election for ward No. 4 was held by a person of the same name, but not the one appointed returning officer, but inadvertently and *bona fide*, so far as appeared.
3. That all five met on the 17th of January, when the reeve of the previous year took the chair and presided.
4. That the councillor elected for ward No. 4 was excluded, owing to the irregularity in the election by a wrong returning officer.
5. That the other four proceeded to elect a reeve, without previously taking an oath of office.
6. That the four were equally divided upon the question, when Gabriel Hawk (who had as one seconded his own

nomination), claiming to be highest on the assessment roll of the past year, gave a second or casting vote in his own favor, Wilson (for ward No. 4) being excluded from voting, though his admission was urged by two of the four councillors who did vote.

7. That he never took an oath of office as councillor.

8. That he took an oath of office as reeve, before John Hawk, the ex-reeve, on the 22nd of January, who certified it in the jurat to have been upon the 17th.

9. That at the meeting of the 17th, the ex-reeve addressed the people upon his withdrawing from that office.

Read contended (referring to the statute 13 & 14 Vic. c. 64, s. 15, and Sch. A. No. 7) that the law is not peremptory upon the clerk to certify, and that the only remedy is by civil action, if wrongfully refused—not by mandamus; but that the refusal was not wrongful, the election of reeve being invalid, having taken place by four councillors, to the exclusion of the fifth, who was elected *de facto* at all events, and entitled to sit till ousted, and the four having acted without previously taking the oath of office as councillors: that there was no power to elect a reeve until the council was full and the oaths taken—Statute 12 Vic. c. 81, secs. 21, 165 and 167, as to the election of ward councillors; secs. 127, 128, 129, 130, 124, and 13 & 14 Vic. c. 64, Sch. A. No. 22, as to the oath of office. That the ex-reeve had no power to administer the oath of office as reeve, on the 22nd of January.

He considered the application untenable on four grounds.

1. Because the council was not full.

2. Because Wilson ought to have been received.

3. Because the four who did act elected a reeve before taking the oath of office as councillors.

4. Because the ex-reeve could not administer the oath, although he did not rely upon the last, except that the ante-dating of the jurat, which the clerk knew to be false, excused him from acting upon it.

M. C. Cameron, in reply, contended the reeve was not bound to take the oath of office, first as councillor and secondly as reeve: that it was not necessary that all the

five wards should be represented: that Wilson had, not been duly elected, and was not entitled to sit; and if he was, his wrongful exclusion did not vitiate the election of reeve: that it was not necessary that the councillors should take the oath of office before electing a reeve, and that when elected the oath, as reeve, was alone required to be taken by him: that, as contended on the other side touching Wilson, so as to the reeve elect, he was elected *de facto*, and entitled to the certificate, and to perform the duties of the office till ousted by a regular proceeding against him: that the omission to take necessary oaths would be no sufficient ground for ousting the reeve, and therefore no valid objection to his admission, or to his receiving the necessary certificate of election. Wherefore a mandamus lies to compel the clerk to execute his duty, which is purely ministerial.—*Greene et al. v. Pope*, 1 *Ld. R.* 125; *the King v. Justices of Derbyshire*, 1 *Bl.* 606; *Rex v. Vice-Chancellor, &c., of Cambridge*, 3 *Burr.* 1647; *Rex v. Windham*, *Cow.* 377.

MACAULAY, C. J.—The 12 *Vic. c.* 81, s. 4, provided for the division of townships into wards; sec. 15, five in number; sec. 21, for the election of township councillors, five in number; sec. 23, to hold office until the third Monday in January, in the year next after that in which elected. By section 10, it shall be the duty of the township municipality to appoint annually fit persons to be returning officers. The elections to be held on the first Monday in January in each year, sec. 21. Sec. 24, the first meeting of the newly elected municipality to be holden on the second Monday next after the election, and at such first meeting the councillors shall proceed to elect from amongst themselves a town reeve. Sec. 25, may adjourn from time to time, at pleasure, &c.

13 & 14 *Vic.*, ch. 64, enacts that in case of an equality of votes in the municipal corporation, on the election of town reeve, &c., the member who, according to the collector's roll of the township for the year next preceding shall be assessed for the highest amount, shall have a second or casting vote on such election.

12 Vic. c. 81, s. 33—the municipal county councils shall consist of the town reeves and deputy town reeves.

13 & 14 Vic. c. 64, Sch. A. No. 7, provides that no town reeve shall be entitled to take his seat in such municipal council until he shall have filed with the clerk of such municipal council a certificate, under the hand and seal of the town clerk of the township, &c., of his having been duly elected, and taken the oaths of qualification and office as such town reeve.

12 Vic. c. 81, s. 108, the town reeve to be head of the township municipality. Sec. 109, and *ex-officio* a justice of the peace—See sec. 135. Sec. 125, may administer oaths appointed under the act, &c., except where otherwise provided. Sec. 127, each township councillor, &c., *shall, before entering upon the duties of his office*, take and subscribe an oath or affirmation of office, therein prescribed—under a penalty of £10, by 13 & 14 Vic. c. 64, Sch. A. No. 22. Sec. 128, the head of every municipal corporation shall be sworn, &c., before the highest court of law or equity sitting within the limits of such corporation, or by the chief justice or judge of such court, at his chambers; or if there be no such court or judge within the limits of such corporation, then, in case of townships, &c., by any justice of the peace for the county in which such township shall be situated; or if there be no such justice of the peace, then before the clerk of such municipal corporation, &c.; who severally are required to administer such oath, and to give the necessary certificate of the same having been taken and subscribed. Sec. 129, every person elected under the act who requires a qualification of property, *shall, before he shall enter into the duties of his office*, take and subscribe the oath of qualification therein prescribed, (sec. 130) under penalties, among other officers, upon councillors and *town reeves*, of any township who shall refuse or neglect to take the oaths of office and qualification, within 20 days after being elected, &c. Sec. 163 and 13 & 14 Vic. c. 64, Sch. A. Nos. 28, 29, 30, *vacancies* to be filled by elections. Sec. 165 provides for the want of any election, or the want of the election of a sufficient number, and authorises the mem-

bers of the corporation, in which a default only occurs, to supply the deficiency, &c. Sec. 167 enacts that the municipal corporation in office on the day of general annual municipal elections shall hold office until their successors shall be elected, or appointed *and sworn into office and the new municipal corporation shall be completed*. Sec. 169 provides for the appointment of county and township clerks, &c. Sec. 173, to hold office till removed, &c.

It appears by the affidavits filed that four of six of the newly elected councillors elected the applicant as reeve without previously taking the oath of office, and that the fifth councillor was excluded as pronounced not duly elected. In the first place, I think he ought to have been allowed to act with the others; for it was not for the other four councillors to determine whether the returning officer appointed, being a person of the same name, was another than the one who held the election. It must be supposed the one who held the election acted as such *bona fide*, and took the oath required to be taken by the returning officer; and if by reason of a mistake, arising from the similarity of names, and want of a sufficient discrimination in the description of the one appointed, the election was not held by the person intended, and the election of the councillor was therefore invalid, the proper course was to apply to the court or a judge in chambers to grant a writ in the nature of a *quo warranto* to try the question. If the method pursued by his colleagues was legal, the power of appointment might in that way be transferred from the electors to the residue of the councillors, under the 12th Vic. c. 81, s. 165.

Moreover, the statute requires the oath of office to be taken by all councillors elected or appointed, before entering upon the duties of their office, and the election of reeve was a first duty to be performed; and by the 12 Vic. c. 81, s. 167, those in office on the day of the annual election were to hold office until their successors were elected or appointed and sworn into office, and the new municipal corporation should be completed. The reeve of last year was considered in office until the applicant was elected

reeve, for it is said he presided at the meeting, and until he was sworn into office, for he administered the oath to him five days after the election. He was elected therefore at a period when the old councillors still continued in office, and at a time when they had no power to elect a reeve, not having taken the oath of office required of them. It is a mistake to suppose no oath of office is required to be taken by councillors elected, or that it need not precede the election of reeve, as not constituting an entry upon their duties. And had the oaths been taken, and the new municipal corporation been completed according to the 167th section above mentioned, the unseemly proceedings which took place would not have occurred. For, instead of an equal division of four councillors, or one of four councillors first seconding the nomination of himself for the office of reeve and then giving a casting vote in his own favor, the corporation would have been composed of five members, and no such tie or struggle for the ascendancy as was displayed on this occasion could have occurred. If the clerk withheld the certificate *bona fide* from a sense of duty, we approve of his conduct; if he was actuated by any undue feeling or partizanship, while we would highly disapprove of his motives, we must still consider him legally justified in the refusal, and do not think that a mandamus should issue. It is said to be usual to grant a mandamus to try the question when there is a fair claim of right to the office, though doubtful, in order to place it in the way of being tried and judicially decided. But here we regard the election of reeve as altogether premature and irregular; and we think the better course to be pursued is for the five councillors elect to take the oath of office, and proceed *de novo* to the election of a reeve—that is, unless there be some obstacle in the way of such a step that we are not aware of. As to costs, see Archd. Crown Prac. 286; the Queen v. the Mayor of Bridgnorth, 10 A. & E. 66; the Queen v. the Mayor &c., of Newbury, 1 Q. B. 751; the Queen v. the Eastern counties Railway Co., 2 Q. B. 578.

McLEAN., J. and SULLIVAN, J. concurred.

Per Cur.—Rule discharged with costs.

**RICHARD CONNELL V. RICHARD OWEN, SURVIVING PARTNER
OF THOMAS MILLS, DECEASED.**

Articles of apprenticeship—Construction—Breach—Action—Parties.

By an instrument under seal made between A. B. and C. D., father and son, of the one part; E. F. and G. H., two partners, coach builders, of the other part: the son, with the consent of his father, bound himself apprentice to the coach builders. The instrument contained a clause securing its performance, as follows: "and lastly, for the true and faithful performance &c. the said A. B., C. D., and E. F. and G. H., do bind themselves unto each other in the sum of," &c. *Held*, in an action of debt, brought by the father alone:—1. That all defendant's covenants were with the son and not the plaintiff; 2. That the words "unto each other" did not mean separately and individually, but that each party respectively became jointly bound to the other: and that there was therefore a non-joinder of plaintiffs.

Quare: the sufficiency of the declaration as given in the report.

DEBT on bond for £50.

Declaration, 9th December, 1852.—"For that, in the lifetime of Mills, to wit, on the 1st December 1843, defendant and said Mills, deceased, made their certain writing obligatory, sealed with the seal of the said defendant and also with the seal of the said Thomas Mills and now shewn to the court here, the date whereof is the day and year last aforesaid, and thereby acknowledged themselves to be held and firmly bound to the plaintiff in the sum of fifty pounds, to be paid to the plaintiff when he, the defendant, and the said Thomas Mills, should be thereunto afterwards requested; yet the defendant and the said Thomas Mills in his lifetime, although often requested so to do, did not, nor did either of them, in the lifetime of the said Thomas Mills, pay the said sum of fifty pounds or any part thereof to the plaintiff; nor hath the said defendant, since the death of the said Thomas Mills, although often requested to do so, paid the said sum of fifty pounds, or any part thereof to the plaintiff; but to do this the defendant and the said Thomas Mills, during the lifetime of the said Thomas Mills, wholly neglected and refused; and the defendant, since the death of the said Thomas Mills, hath from thence hitherto wholly neglected and refused, and still doth neglect and refuse. By reason whereof an action hath accrued to the plaintiff."

The defendant demanded oyer of the instrument declared on, and it was set out as follows:—

"This indenture, made the first day of December in the year of our Lord one thousand eight hundred and forty-eight, between

pounds to the plaintiff, whereas it should have averred that the defendant did not pay to the plaintiff or to Thomas Mills in his lifetime, or to the said Richard Connell the younger, the said fifty pounds; and also, that the said declaration is in many other respects uncertain, informal and insufficient.

Crooks, for the demurrer, contended the instrument set out on oyer was not a writing obligatory; that debt would not lie upon it at all; and the action, if any lies, should be covenant, assigning breaches &c.: that, as a debt, each bound himself to the others, and the effect was to neutralize all obligations between them.

Hallinan, for plaintiff, referred to 1 Saund. 58, *b.*, and submitted that debt would lie; a debt being interchangeably and reciprocally acknowledged; and if so, that breaches need not be assigned in the declaration, but might be replied if performance was pleaded: that it was doubtful whether the plaintiff could sustain any action against the defendant except debt, as for breaches of covenant entered into by the defendant with plaintiff's son, and for performance of which he became bound to the plaintiff through the medium of the penalty declared for.

MACAULAY, C. J.—It appears to me that the indenture is between the plaintiff and his son, of the one part, and the defendant and Mills of the other part, and that all the defendant's covenants are with the son and not the plaintiff, who is only joined to testify his assent to the son's binding himself an apprentice to the defendant and Mills, and who may have been a minor at the time. I also think that in the penal part, at the end, the words "*unto each other*," do not mean severally and individually, but, *each party* respectively became bound to the other party—that is, the defendant and Mills, jointly to the plaintiff and his son jointly, and *vice versa*. If so, it follows that there is a non-joinder of plaintiffs; for the indenture shews that the son was beneficially interested in all the defendant's covenants; and if by reason of a breach by the defendants of any such covenants the penalty is incurred, the son must be entitled to sue therefor as well as his father; and if the father could sue alone, it would follow that the defendant might be com-

pelled to pay the penalty twice over—that is, to the plaintiff in one action, and to his son in another, for the same breaches of covenant. It is unnecessary therefore to consider the sufficiency of the declaration as upon a single bill obligatory, without stating or assigning any breach of the defendant's covenants. I have not made up an opinion on the point, and will therefore merely say that I am not satisfied the plaintiff can declare upon such an instrument as a single bill obligatory, without more; and that a distinction may exist between a sum acknowledged as a debt liable to be defeated or saved upon performance of a condition—as performance of covenants in another deed, for example—and a penal sum acknowledged in the form of liquidated damages to become a debt in the event of the non-observance of certain covenants or conditions; the one being acknowledged as a debt presently, and the other contingently. If the plaintiff applies and obtains leave to amend, this objection may be obviated by stating the breaches of covenant in the declaration: should it become necessary, the point must be further considered.—*McLean v. Tinsley* (7 U. C. R. 40); *Caldwell v. Backe* (2 Ex. R. 518); *Sorsbie et al. v. Park* (12 M. & W. 146); *Hopkinson v. Lee* (6 Q. B. 964).

MCLEAN, J. and SULLIVAN, J. concurred.

Per Cur.—Judgment for defendant.

STRACHAN AND WIFE V. ORMOND JONES.

Evidence—Admissibility of parties to the suit.

The defendant in a cause cannot be rejected from giving evidence in his own behalf on account of his presence in court during the progress of the cause.

EJECTMENT for land and premises in Brockville.

This was a rule granted in Michaelmas Term last, calling upon the plaintiffs to shew cause why the verdict obtained by them should not be set aside and a new trial had between the parties, without costs, on the grounds that the verdict was contrary to law and evidence, and that there was misdirection in the charge of the learned Chief

Justice who tried the cause, and that the defendant was improperly rejected by the said Chief Justice as a witness in his own behalf, and his evidence improperly refused.

No affidavits were filed, and this rule was granted with reference to the notes of the Chief Justice, who tried the cause, upon which it appeared, that on the second day of the trial, when the defence was entered upon, the first witness offered was the defendant himself, who proposed to be examined as a witness. This was objected to on the ground that he had been all the time in court during the progress of the trial ; to which it was answered, that he had been subpoenaed by the plaintiff, and therefore bound to be all the time in court. The Chief Justice rejected him. This was the substance of his note upon the subject.

It did not appear that any general order had been made, previous to the trial of this cause, that no parties should be examined as witnesses for themselves unless they abstained from being present in court during the examination of the other witnesses.

By the *Nisi Prius* record, it appeared that the defendant pleaded in person.

Cameron, Q. C., shewed cause, and supported the verdict ;—1st. On the merits—saying that the propositions intended to be left to the jury were read over to the counsel on both sides and acquiesced in before the charge was delivered ; and that, even if strong expressions of the Chief Justice were used in his observations in reference to such points, it was no objection to the verdict ; and that it was not shewn that he told the jury, as suggested, that everything was to be presumed against the defendant because he had solicited the gift, and drawn the deed and will in evidence, and on which he relied.

2nd. As to the rejection of defendant when offered as a witness in his own behalf—that the fact was so, and that it was authorised by the decisions and practice of our courts. He read the late case of *Cobbett v. Hudson*, reported in the *Law Times* of Dec. 4th 1852, vol. 20, no. 505, p. 109-10—which was against him ; but relied upon the decisions of our own courts nevertheless, which went further than

the cases had gone in England, such as—*Stones v. Byron*, 4 D. & L., 393; *Deane v. Packwood*, *ib.*, 395, (b); *The King v. Brice*, 2 B & A., 606, commented upon by Lord Campbell in *Cobbett v. Hudson*. Also to *Law Times*, 20th November 1851, for another case.

Hagarty, Q. C., and *Vankoughnet*, Q. C., supported the rule, remarking at some length upon the facts in evidence, and their bearing upon the case, as sufficient to establish imbecility of mind in the donor and testatrix, and to prove her *non-compos*. But at all events, relying upon the rejection of defendant, who had been notified by the plaintiffs to attend, to be called by them, and who, having attended accordingly, and not been directed or asked to leave the court by order, or by the opposite party, could not be arbitrarily rejected by the judge at *Nisi Prius*. On the merits, they referred to—2 *Phill.*, 459, 551; *Waring v. Waring*, 12 *Jur.*, 947; *Reg. v. Hill*, 15 *Jur.*, 470; *Creagh v. Blood*, 2 *Jon. & Lat.* 516. Submitting that the question to be asked was, whether her faculties were so impaired that she was incompetent, or liable to be, and was practised upon unduly or unfairly by the defendant, which the evidence did not prove—*Benedict v. Boulton et al.*, 4 *U. C. R.*, 96; 8 *Law Times*, 197; *ib.*, 371; *Cameron v. Forsyth et al.*, 4 *U. C. R.* 189; *Taylor Ev.* 928. Witnesses may be ordered out of court, if desired.—*Southey v. Nash*, 7 *C. & P.*, 632; *Thomas v. David*, *ib.*, 350. But it is not usual to require the attorney of the parties to withdraw.—*Cooke v. Nethercote*, 6 *C. & P.*, 741; *Everett et al. v. Loudham*, 5 *C. & P.*, 91; *Pomeroy v. Badgley*, *R. & M.*, 430; *ib.*, 431, note; *R. v. Colley et al.*, *M. & M.*, 329; *Chandler v. Horne*, 2 *Moo. & Rob.*, 423; witness excluded, *Winter v. Mixer et al.*, 10 *U. C. R.*, 110; (admissible), *R. v. Reily*, 18 *Law Times*, 293.

MACAULAY, J.—I expressed my individual opinion in the case of *McBean v. Naphagie* that the statute 14 & 15 *Vic.*, c. 66, since repealed by the 16 *Vic.*, c. 19, s. 13, did not intend to render the parties in an action admissible as witnesses in their own favor; but the Court of Queen's Bench having held that the effect of that statute was to qualify

a married woman, who was prevented from being a competent witness in any civil proceeding, either for or against her husband. The defendant, then, was competent to be a witness for himself at the last assizes in this cause; and the plaintiff might compel him to give evidence, on pain of having the case taken *pro confesso* against him if he failed to appear. Being, then, a competent witness, could he be legally rejected on account of his having been in court during the progress of his suit?

I have always been of opinion that the fact of a witness being present could not disqualify him, and have so ruled in all cases which have come before me at Nisi Prius. I could not perceive, that however desirable it might be that a party to a suit should not hear the evidence, and thus have an opportunity of supplying any facts to which other witnesses might be unable to testify, there was no authority given to a court or judge to declare a person to be incompetent as a witness who was declared to be competent by law. The view thus taken by me is sustained by the decision in a case of *Cobbett v. Hudson* (20th Law Times, 109), in which the Court of Queen's Bench in England granted a new trial on account of the plaintiff not having been allowed to conduct his own case, and be a witness on the trial. I think that case rests upon incontrovertible grounds; and, under the circumstances, that the defendant, on account of his rejection as a witness, is entitled to a new trial, without costs.

SULLIVAN, J., concurred.

Per Cur.—New trial, without costs. (a)

(a) A party to the cause is no longer admissible as a witness in his own behalf—18 Vic. ch. 19.

JOHN DOE, ON THE JOINT AND SEVERAL DEMISES OF ELIJAH
KETCHUM AND PHILLIP KELLER, v. RICHARD ROE.

Ejectment—Non-suit for not confessing lease &c.—Time to move against.

Where in an action of ejectment lease, entry and ouster is not confessed by defendant, and plaintiff is therefore non-suited, defendant, as in other cases, may move against the non-suit within the first four days of the following term, although a writ of possession against Richard Roe at an earlier period may be regular.

In this case defendant moved to set aside the judgment &c., on the third day of the term following the nonsuit, but his rule was discharged from informalities in his affidavit. He renewed the application on the last day of the next following term, and shewed a strong case upon the merits. The court granted him relief, looking upon his second application as a continuation of the first.

This was a rule granted in Easter Term 15 Vic., and dated the 19th June 1852, calling upon the plaintiff to shew cause on the first day of the following term why the judgment entered, the writ of *hab. fac. poss.*, and all proceedings had thereon and on the said judgment, should not be set aside with leave to Horatio Nelson Casey, the person in possession of the premises in question, to file affidavits in support of this rule the week before the first day of the next term, furnishing the plaintiff with copies thereof before the said term, &c.—with a stay of proceedings in the meantime.

It appeared that Horatio Nelson Casey had been made defendant, as tenant in possession, in place of Roe; that the cause was taken to trial at the assizes at Cobourg last spring (1852), when his counsel declining confessing lease, entry and ouster in consequence of the absence of the papers necessary to his defence, in possession of his attorney, who was absent when the cause was called, expecting criminal business to have taken precedence, and in consequence of the state of the civil docket, that judgment against the casual ejector was entered on the third day of the following term: that on the fourth day of such term (10th June 1852), a rule was obtained to set aside the non-suit intituled in the cause in which said Casey was defendant, and also the judgment against the casual ejector and all subsequent proceedings, as entered too soon: that the affidavits in support of this application were intituled in the same way; owing to which the rule was discharged on the ground that the affidavits were incorrectly intituled.

The present rule was granted upon a renewed application, and *Cameron*, Q. C., shewed cause. He handed in a number of affidavits, saying copies only had been filed, but that he consented to the originals being substituted, but objected that the application was too late—1st. That the application should have been made on the first day of term, in anticipation of the judgment, which was regularly entered on the third, wherefore the first application was out of time and too late. 2nd. That if four days were allowed to move, still the former rule having been discharged, and this application not made till late in the term (the last day), was entirely too late; that a verdict or non-suit in an ordinary case could not be thus moved against; and *a fortiori* not a non-suit for not confessing lease, entry and ouster, and which ought to have been admitted at all events: that the rule was not moved as upon a leave reserved to renew the application as against *Roe*.

No counsel appeared to support the rule, but Mr. *Cameron* intimated that it was desired to be left to the court for decision on the affidavits &c.

MACAULAY, C. J.—On reference to the affidavits, a strong case of merits is made out *prima facie*, which however are in relation to some material facts, strongly repelled by affidavits in reply. But it is unnecessary to go into the statements of the parties or to compare them, because it is clear that relief should be granted and an opportunity afforded to the tenant in possession to defend the cause before the possession is changed, if by the practice and law of the court it is in our power to afford it.

I was not present when the former rule was granted and discharged, and the present one afterwards granted; but, from what my learned brothers say, I infer that it was their intention to allow the tenant to move again upon amended affidavits; and had any difficulty owing to the lateness of a second application been apprehended, they might, and I suppose would have, instead of discharging the former rule, suspended it until the tenant filed correct affidavits, and then permitted his motion paper and rule *nisi* to be amended and modified thereby accordingly.

The practice seems to be that where a plaintiff in ejectment is non-suited because the defendant declined to confess lease, entry, ouster and possession, pursuant to the consent rule, he is at once entitled to enter judgment as by default against the casual ejector, and to issue a writ of *hab. fac. poss.* on the first day of the following term, if not sooner (a). But I do not find it decided that the defendant (if he can be admitted to move at all for relief from the non-suit) is too late on the fourth day of the following term if a change of possession has not taken place and the execution of the writ of *hab. fac. poss.* can be intercepted. He may have received no notice of trial, and account for his non-appearance to confess most satisfactorily; and, if so, the lessor of the plaintiff could not be suffered to oust him, by taking advantage of his own wrong, if the non-suit was attributed to his fault. My impression is, that, as in other cases, the defendant may be heard to move within the first four days of the term, although the issue of a writ of possession against Richard Roe, at an earlier day, may be regular. If so, then, I think, the present must be looked upon as a continuation of the first application as respected the non-suit merely: the former affidavits may have been correctly intituled in the cause as against the tenant; but, as the first object was to set aside the judgment against Roe, they should, in the title of them, follow that judgment. The present application then is not to set aside the non-suit which stands, but it is to set aside a judgment by default entered against Roe. The effect, of course, is to enable the tenant to re-appear and defend after having once failed at *Nisi Prius*; and the application is exposed to the objection of delay urged against it by the plaintiff's counsel. Admitting the force of this objection, and aware of the inexpediency of making precedents that may hereafter prove inconvenient, we nevertheless feel merits so strongly suggested on the affidavits filed, that we do not think the court would be justified in suffering the possession to be changed without once more affording the tenant the opportunity of a trial while it is in our power to do so

(a) 2 T. R. 779-780, note. 1 B. & C. 118.

without any greater violation of the rules of practice than such a course seems to us to involve.

We think therefore that the rule should be made absolute on payment of costs, with leave to the tenant to appear and plead, and enter into a new consent rule as of the same term and date as the former; unless it be understood between the parties that the old proceedings as to appearance, plea and consent rule are to stand good for the purposes of proceeding to trial, and as if no non-suit for not confessing &c. had taken place.

McLEAN, J. and SULLIVAN, J. concurred.

Per Cur.—Rule absolute, on payment of costs.

JAMES JOHN HAYES v. JAMES ADDY.

Indenture of lease—Construction—Liability of surety.

An indenture of lease was made between three parties—plaintiff of first part, one A. B. of second part, and defendant of third part. The party of the first part leased to the party of the second part a certain hotel, with certain goods and chattels; and the party of the second part covenanted, among other things, at the expiration or other sooner determination of the lease, to pay the party of the first part the difference between £550 and the value of such goods, which value should be ascertained by, &c. Then it proceeded as follows: "The said party of the third part (defendant) covenants with the said party of the first part that the said party of the second part (lessee) shall pay the difference between the said sum of £550 and the value of such of said goods and chattels, &c.," not containing the words "*to be ascertained as aforesaid.*" *Held*, that notwithstanding such omission, upon non-performance by the lessee, plaintiff could recover against defendant.

COVENANT—Upon an indenture of lease, dated the 9th September 1850, between the plaintiff of the first part, and Nicholas Brouse of the second part, and the defendant of the third part, whereby plaintiff leased to said Brouse a messuage in the city of Toronto, called the American Hotel, with certain goods and chattels mentioned in a schedule thereto annexed, then in plaintiff's possession, as might be upon the said premises, to hold until the 10th September 1854, at a weekly rent of £7, payable on Monday of each week, &c. The declaration stated that the lessee entered: that the indenture of lease contained a right of re-entry in default of payment for five days, &c.: that the lessee covenanted with the lessor, on the expiration or

sooner determination of the term, and within a reasonable time after the value should be ascertained, in pursuance of the provision therein contained, &c., said lessee would pay the plaintiff the difference between £550 and the value of such goods leased as aforesaid, &c., which value should be ascertained by the valuation of two indifferent persons, as therein provided, &c. : that defendant covenanted with plaintiff that said lessee should pay to the plaintiff the difference between the said sum of £550 and the value at the time of possession thereof taken by plaintiff, as aforesaid, *to be ascertained as aforesaid*, of such of the said goods so leased as aforesaid whereof possession should be given to or taken by plaintiff at the expiration or sooner determination of the term, &c. Plaintiff then averred that at the time of the lessee's entry there were £550 worth of goods on the premises of which he took possession : that on 27th September 1852, rent became due and in arrears, wherefore plaintiff entered and took possession of such of the leased goods as were on the premises, &c. : that plaintiff gave notice—appointed Mr. Crew his valuator : that the lessee neglected to appoint another ; wherefore Crew alone valued the goods, at the time plaintiff resumed possession thereof, at £341 19s. 5d., the reasonable value thereof : that notice thereof was given to the lessee, and the amount demanded—also to defendant—but the difference, £550 less £341 19s. 5d., being £208 0s. 7d., was not paid.

The declaration contained several other counts, as upon *other* indentures of the same date and import ; in all of which the covenant of defendant was alleged in similar terms.

The defendant, to the whole declaration, pleaded that the said indenture was not his deed, and tendered issue.

At the trial, before McLean, J., at the last Toronto assizes, the plaintiff gave in evidence an indenture corresponding with that stated in the first count, with the exception hereafter stated.

The lessee, among other things, covenanted with plaintiff to pay him the difference between the sum of £550 and the *value* of such goods whereof possession should be given to or taken by the plaintiff, at the expiration or sooner

determination of the term; *such value* to be ascertained by the valuation of two indifferent persons, each of whom to be an auctioneer or upholsterer, and as such resident for two years at least in Toronto prior to their appointment as valuers, and would *bona fide* act upon such appointment; and one of whom to be named by the parties of the first and second parts respectively, their respective executors, administrators and assigns, to the other party, his executors, administrators or assigns, by letter mailed within ten days next after the expiration or other sooner determination of the term thereby created, and directed to him or them at Toronto, and not elsewhere; or, in the event of neglect or refusal to nominate as aforesaid, such indifferent person aforesaid, as valuator aforesaid, by either of the said parties of the first and second parts, their respective executors, administrators or assigns, then such value to be ascertained by the valuation of such indifferent person as aforesaid who shall have been named and appointed by the said party or parties not refusing or neglecting so to do; or, in the event of disagreement between the valuers to be nominated as aforesaid, the value to be ascertained by some third person, auctioneer or upholsterer, resident as aforesaid, to be chosen by such valuers; or, in the event of its being found impracticable to ascertain the value by either of the modes or in manner aforesaid, *then* the difference between the said sum of £550 and such value as the said goods and chattels whereof such possession may be given or taken as aforesaid, *may be reasonably worth*. Then it proceeded—"And this indenture further witnesseth, that in consideration of this lease to the said party of the second part, the said party of the third part (defendant) covenants with said party of the first part that the said party of the second part shall pay the difference between the said sum of £550 *and the value* of such of the said goods and chattels, whereof possession may be given to or taken by said party of the first part, at the expiration or other sooner determination of the term hereby created" (not containing the words "*to be ascertained as aforesaid*"); and the omission was objected to as a fatal variance in the statement of the defendant's covenant.

The jury found a verdict for the plaintiff for £211 3s. damages, with leave reserved to the defendant to move a nonsuit, or to reduce the verdict.

Accordingly in Hilary Term last *Vankoughnet*, Q. C., obtained a rule upon the plaintiff to shew cause why a nonsuit should not be entered, or the verdict be reduced to nominal damages.

Leith shewed cause during the same term, and contended that the defendant guaranteed performance by the lessee of his covenant, which was, to pay the value according to the valuation provided for, or, if that failed, what the difference in value might reasonably amount to: that the lessee was not bound to pay on any other principle; and if the defendant's covenant was not equivalent to that of his principal, the defendant would be covenanting for the performance by the principal of what the principal was not bound to perform; and he submitted that the fair construction of the defendant's covenant was, that the lessee should pay as he agreed to pay.

Vankoughnet, in reply, contended that the declaration added to the face of the covenant, by the words "to be ascertained as aforesaid," which were neither expressed in the covenant nor implied, and sought to bind the defendant to a valuation by arbitrators over whom he had no control, and to whose decision he had never agreed, wherefore the variance was material and fatal: that as against a surety, the covenant cannot be extended. Cases cited—*Mills v. The Guardians of the Poor of the Alderbury Union*, 3 Ex. R. 590; *Simpson v. Cooke et al.*, 1 Bing. 452; the Chancellor, &c., of the University of Cambridge v. Baldwin, 5 M. & W. 580; *Chapman v. Beckinton*, 3 Q. B. 703. As to valuation—*Thurnell v. Balbirnie*, 2 M. & W. 786; *Ess v. Truscott*, 2 M. & W. 385; *Reeves et al. v. White*, (21 L. J. N. S. Q. B. 169, 10 Am. Eng. Rep. 332).

MACAULAY, C. J.—This is a covenant by deed indented; and Sheppard's Touchstone, p. 52, s. 4, lb. p. 88, shew the force of an indenture as distinguished from a deed poll in binding all parties, as severally adopting the whole of its terms.

But, independently of such considerations, I think the only sensible construction that can be given to the defendant's covenant is, that he undertook the plaintiff's tenant should pay the difference of value in the goods ("*to be ascertained as aforesaid*"), as expressed in the lease, "or as aforesaid;" and payment according to what they were reasonably worth was only an alternative, contingent upon the failure of a valuation by appraisers, as previously agreed upon in the indenture.

To limit or narrow the defendant's covenant as contended for by his counsel, would be to ascribe to him an obligation different from that incurred by his principal. A valuation regularly had might exceed what a jury might think the goods reasonably worth. In that event, the principal would be bound to pay a larger definite or ascertained sum, and the defendant only bound that he should pay a less unascertained amount; or, reversing it, the valuation might be less than the reasonable worth, and then the defendant would be bound that the principal should pay a larger sum than he was liable and bound to pay; and if so and the defendant was forced to pay in his default, or to pay the difference, and could take recourse against the principal for reimbursement, the tenant might in the end be indirectly forced to pay more than he agreed, or was directly bound to pay, and be subject first to comply with a valuation, and afterwards to make good to his surety, if as against him the plaintiff could convince a jury that he ought to receive more; not that I mean to say any such a course could be legally taken.

It appears to me clear that only one consistent interpretation can be placed upon the defendant's covenant, which is, that he undertook the tenant should pay as he had covenanted to pay—that is, according to valuation of appraisers, or, if that failed, then according to the reasonable worth of the goods.

A valuation has been had; the other alternative does not arise; and therefore the plaintiff appears to me entitled to recover. I think there is no variance in substance between the defendant's covenant as stated in the plea, and as

proved by the deed produced at the trial.—See Weedon v. Woodbridge, 14 Jurist, 864.

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged.

SAMUEL P. STOKES V. BRIGHAM L. EATON.

Seizure of goods by sheriff—Ownership disputed—Double remedy—Interpleader—Trespass—Costs.

Goods seized by the sheriff under an execution from this court, as the goods of B., were claimed by C. An interpleader was then awarded, to which the claimant became a party. The sheriff sold the goods and paid the proceeds into this court, to await the result of the interpleader issue. During the pendency of the interpleader the claimant brought an action of trespass in the Queen's Bench against the execution creditor for the same seizure, which action was tried at the same assizes with the interpleader issue. The claimant was successful in both cases. The proceeds of the sheriff's sale were then paid to him out of the court. Upon application to this court to stay the proceedings in the Queen's Bench suit, the rule was discharged, as this court has no such power.

The court suggested that the plaintiff in the Queen's Bench suit be called upon to deduct the amount received out of this court from his verdict in the Queen's Bench, and be left free to enforce the residue in that suit—costs of the interpleader issue to be refused him.

This was a rule calling upon James Cotton to shew cause why he should not stay all further and all proceedings in an action of trespass mentioned in the affidavits and papers filed, and brought by him against the plaintiff in the Court of Queen's Bench, in respect of the goods and chattels sold by the sheriff of the united counties of York, Ontario and Peel, as in the said affidavit mentioned: and why a rule of this court should not issue ordering such stay of proceedings—with stay thereof in the mean time.

It appeared from the affidavits filed, that before the application under the interpleader act hereafter mentioned, a writ of *fi. fa.* issued out of this court at the suit of the plaintiff against the goods of defendant, to the above mentioned sheriff, to levy £232 11s. 2d., besides interest for debt, and costs—returnable on the first of Hilary Term, 1852: that under such writ the said sheriff, on or about the 2nd of February 1852, seized certain goods and chattels after mentioned, which remained in his custody and possession: that on the 18th or 19th of February notices of claim to the said goods were served

upon him, one on behalf of Pauline Albin, and one of the said James Cotton, the last of which claimed about 60,000 feet of sound lumber at Quigley's Mills Pickering, about 20,000 feet at Whitney's Mill, Pickering, and about 130 or 150 saw logs near said mill and newly cut; and 80,000 feet of lumber at the defendant's mill at the Rouge, Scarborough—about 80 saw logs—some of oak; also the furniture in the dwelling house of the said defendant; three cows, and from 300 to 350 saw logs on top of the hill south of the mill—lately hauled; and the sheriff, being likely to be put in trouble, &c., prayed relief under an affidavit sworn the 20th of February 1852.

On the same day an interpleader summons was issued by Mr. Justice Burns, calling on the plaintiffs Cotton and Albin (respectively) to shew cause why they should not appear and state the nature and particulars of their respective claims to the goods seized, and maintain or relinquish the same, and abide by such order as might be made therein.

On the 28th of February said James Cotton and plaintiff appeared, when Cotton claimed the above mentioned property under a mortgage thereof from defendant preceding the seizure, and duly registered, and supported by his own affidavit, and those of Charles Raymond and Brigham Lee, upon which Mr. Justice Burns, on the 28th of February 1852, granted the interpleader order intituled in this cause, and ordered that upon satisfactory security being given to the said sheriff for the safe keeping and forthcoming of the goods and chattels seized by him under the aforesaid writ, he should withdraw from the possession thereof; and that unless such security was given and approved of within six days from service thereof, the sheriff should proceed to sell the said goods and chattels, and after deducting the expenses of the sale, should pay the proceeds arising therefrom into this court to abide further order therein; and that the claimants (respectively) do proceed to the trial of a feigned issue in this court in respect of the goods claimed by them (respectively) in which issue claimants should be (respectively) plaintiffs, and the plain-

tiff in this action defendant ; and that the question to be tried should be, whether at the time of the delivery of the writ of *fi. fa.* to the said sheriff the said goods claimed by them (respectively), and seized as aforesaid, were, or any of them were the goods of the claimants (respectively)—such issue to be tried at the next assizes for the said united counties ; and he reserved the question of costs and all further questions until after the trial of the said issue.

The security upon which possession was to be relinquished was not given, and the sheriff sold the goods, and paid the proceeds into court.

After such sale said Cotton commenced an action of trespass in the Queen's Bench against plaintiff *de bonis asportatis*, and obtained a verdict at the spring assizes in 1852 for £300.

A rule to stay proceedings therein, or for a new trial, was discharged.

The said interpleader issue was tried at the same assizes, and said Cotton obtained a verdict, it being sufficient for him under the issue framed to shew title to any part of the goods, however small. An application in the following term to amend such issue was unsuccessful.

The goods in the action of trespass, and those seized and sold as directed, were identical.

Upon an affidavit of the above facts, and that Cotton still had possession or control of the lumber, and had sustained no real injury, &c., Mr. Justice Burns, on the 30th of September 1852, granted a summons at the instance of the attorney of the plaintiff Stokes intituled in this cause, calling upon the said James Cotton to shew cause before the judge in chambers the next day why the proceeds of the sheriff's sale should not be paid over to the said plaintiff (Stokes), with such further directions as to costs and otherwise as he should deem meet ; or why an order should not issue for a rule nisi returnable the 1st day of the next term to compel the said Cotton to stay all further proceedings in the aforesaid action of trespass, with stay of proceedings in the mean time ; or for a rule nisi on such other terms as to the said judge in chambers should seem meet.

This summons was, on the 8th and 11th October 1852, enlarged upon Cotton's undertaking not to proceed in either action; and on the 13th of October it was further enlarged by Mr. Justice Sullivan till Mr. Justice Burns appointed a day for the argument before him. On the 17th of November 1852 *Cameron*, Q. C., consented to let the suit stand without any prejudice to the plaintiff, and without Cotton taking any proceedings.

On the 29th of November the professional agents of the parties attended before Mr. Justice Burns, but he had not made any order or decision therein. No judgment had as yet been entered by Cotton upon the verdict obtained by him against plaintiff in the trespass suit.

A rule nisi for a new trial in the interpleader suit was discharged by this court. After which this court directed that the proceeds of the sale of the goods should be paid over to the said Cotton, and the same was paid over to him: no portion of the damages in the action of trespass had been paid, and the identity of the goods for which damages in that suit were recovered, and those seized and involved in the interpleader issue, was repeated by Mr. Crooks, plaintiff's attorney, in an affidavit made by him on the 8th of February 1853, and filed upon this application.

Cameron, Q. C., shewed cause, and in the course of the argument it was on both sides consented that the court might refer to the notes of the Chief Justice of the Queen's Bench, who tried both the action of trespass and the interpleader issue, with a view to the merits—the counsel for Cotton contending the action of trespass was in the verdict restricted to special damages, and the counsel of the plaintiff alleging that it embraced the value also—*Lucas v. London Dock Company*, 4 B. & Ad. 378, was cited.

MACAULAY, C. J.—It was suggested by some of the judges in the case of *Hollin v. Laurie et al.* (3 C.B. 334), that where the claimant, who had become a party in an interpleader issue, to try the right to goods sold by the sheriff under a *fi. fa.* institutes an action of trespass in another court for the seizure of the same goods, the proper course was for the plaintiff in the execution, and the defendant in the claimant's suit, to apply

to the court in which the interpleader rule was granted to restrain the claimant from pursuing the twofold remedy. But it is clear (to apply it to this case) that this court cannot order a stay of proceedings in the Queen's Bench ; and all we could do at best would be to proceed against the claimant as for a contempt of this court in bringing that action pending the interpleader issue in this court, if impliedly restrained by the rule (for he is not expressly prohibited)—that is, as for an infraction of that rule if infringed, or to grant our rule upon him in the nature of an injunction, to prohibit his proceeding with the Queen's Bench suit, and then to attach him for a contempt if he disobeys that order. The latter is the course desired upon this application.

It may be a correct one, but I am not quite satisfied of its propriety. No case is cited in which it has been done in England, and I can find no precedent for it. But I do find instances in which the court in which the action of trover or trespass has been brought has ordered proceedings to be stayed when the judge of a county court, authorized by statute so to do, has decided upon the right of the claimant to the goods. The case of *Jessop v. Crawley* (15 Q. B. 213) is an instance.

It may be said that in such a case the question is finally decided, and yet perhaps cannot be pleaded in bar. However that may be, one court does act summarily upon the production of the decree or order of the other ; and I am not satisfied the pendency of an undecided interpleader issue to try the title to specific goods pending in one superior court, may not be pleaded in abatement of an action of trover or trespass in another superior court for the same goods. I am not, however, aware of any decision upon the point, and it does not now call for consideration.

Upon reference to the notes of the Chief Justice of Upper Canada, who tried both the action of trespass and the interpleader issue, it appears clearly that in the action of trespass the claimant Cotton did recover the value of the goods—whether anything more was awarded to him by the jury is not quite certain. I have not seen the declaration—it is not laid before us—I am not therefore informed whether special damages are claimed in the

action of trespass; but according to the evidence the verdict (£300) very little exceeds the price at which the sheriff sold the goods. The gross amount of his sales is stated to have been £290 9s. 1d. How much was paid into court by the sheriff the affidavits do not state, nor am I aware. The difference must have been retained for fees and expenses. I take it that if the claimant had confined himself to the interpleader issue, the plaintiff in this case and defendant in that issue would have been liable to the costs, including the sheriff's fees, &c., if not deducted according to the provisions of the statutes 7 Vic. ch. 30, sec. 6, and 9 Vic. ch. 56, sec. 5, in that behalf. So that it in the end would be the same thing to him whether the gross amount of sale was paid into court, or the sheriff's costs deducted and retained by him; for if all was paid in, the plaintiff would be liable thereout to pay the sheriff. Moreover, if the claimant bought in the lumber through an agent, and paid the sheriff the sum of £290 9s. 1d., the verdict in the Queen's Bench suit will little more than reimburse him; and if the effect was to continue the lumber in his possession or control, he must have paid therefor to the sheriff as much as he will recover back from the plaintiff. Besides this, the plaintiff, through his attorney, long after the court of Queen's Bench had refused to disturb the verdict in the action of trespass, instead of addressing the present application to this court, applied for a judge's order to receive the amount paid into this court by the sheriff, thereby indicating an acquiescence in the Queen's Bench case, and only seeking to avail himself of the amount realized by the sheriff towards meeting it; and the judge's summons is said to be still pending and undecided, although Mr. Justice Burns told me he had refused any order, because the money had been ordered by this court to be paid to the claimant, and had been paid to him. After all the delay and laches that have occurred, it is too late now for us to do more than to require the claimant to elect. Assuming that he will elect to enforce the Queen's Bench verdict, as being most beneficial, that court would, I suppose, order satisfaction to be entered to the amount, and received out of this court; or, if

necessary, this court might order him to restore it, as suggested by Mr. Cameron, unless he consented to deduct it. The costs of the interpleader issue rest with the judge who granted it. I will therefore merely remark that, as the claimant has irregularly taken a double remedy, the action of trespass in the Queen's Bench suit may be so far looked upon as an abandonment of the claim to the goods themselves, under the interpleader order, as to preclude his claim for the costs of that issue—it being unnecessary to put the plaintiff to the costs of two trials about the same matter, when, for all that appears, one was sufficient; for I do not perceive that special demurrer constituted any part of the claim or verdict in the trespass case; and if they did the claimant should have obtained leave to proceed therefor in one suit, concurrently with the proceeding for the goods in specie under the interpleader order. This he did not do; but acted upon his own discretion in suing in another court for the value of the goods, while a party in a proceeding in this court for the goods themselves, or the amount realized therefor at the sheriff's sale and paid into court. Under such circumstances, the just course seems to be to call upon the claimant to deduct the amount recovered by him out of this court from the amount recovered in the Queen's Bench, to leave him free to enforce the residue of verdict and costs in that suit against the plaintiff, and to enforce the claimant's costs of the interpleader issue as against the plaintiff—i. e. exclusive of the sheriff's costs, which I suppose he has retained out of the proceeds of his sale. This rule must therefore be discharged or modified, if it can be done according to the foregoing suggestions. I may add that at the trial of the Queen's Bench action the claimant gave evidence to implicate the present plaintiff as a trespasser, by intermeddling, &c., and did not rely merely upon his adoption of the seizure by coming in under the interpleader summons (a).

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged.

(a) See the case in the Queen's Bench, *Cotton v. Stokes*, vol. x. U.C.R. 262.

DAVID TORRANCE, JOHN TORRANCE, AND LONSON HILLIARD,
v. MARTIN PETER HAYES AND THOS. HAYES.

Carriers and Wharfingers—Local customs—Notice—Pleading.

Assumpsit on the common counts for work and labor, &c., by plaintiffs, who were carriers by water. Plea, setting forth a delivery of the goods carried by plaintiffs to a wharfinger at Toronto, to whom defendants, "*according to the customs and usage of forwarders and carriers at Toronto,*" paid the plaintiffs' claim. *Held*, plea bad for not averring notice of the custom to the plaintiffs.

ASSUMPSIT—Writ issued 4th March, 1852. Declaration—13th March, 1852.

1st count—£50 for work and labor by plaintiffs' servants, steamers and vessels, &c.

2nd count—£50 for the carriage of goods in steamers and vessels of plaintiffs, for and at defendants' request, &c.

3rd count—£50, money paid.

4th count—£50 upon an account stated.

Pleas—25th March, 1852.

3rd plea. That the several sums of money in the declaration mentioned accrued due as therein named, to the plaintiffs as forwarders and carriers by water of goods, &c., from, to wit, the city of Montreal to the city of Toronto, to be there delivered to divers persons, to wit, to the defendants and others; and that, *according to the custom and usage of such forwarders and carriers*, then and at the time of the payment after named existing at Toronto aforesaid, persons to whom goods, &c. (forwarded and carried by such forwarders and carriers) are delivered by a wharfinger at Toronto aforesaid (to whom the same have been delivered by such forwarders and carriers respectively) *are authorised (when not notified (quære not) so to do* by such *forwarders and carriers*, who may have delivered such goods, &c., to such wharfinger) *to pay* such wharfinger the amount due from them to such forwarders and carriers, for the forwarding and carrying such goods, &c., and for moneys paid by such forwarders and carriers in relation and incident to such forwarding and carrying; and that *the moneys* in the said declaration mentioned accrued due to the plaintiffs, *and the account therein mentioned was stated* in respect of the forwarding and carrying by the

plaintiffs from Montreal to Toronto aforesaid, as forwarders and carriers, first, aforesaid goods, to wit, 100 kegs of nails and 3 cwt. of sugar; and in respect of moneys by them paid as such forwarders and carriers, in relation and incident to such forwarding and carrying; and that the said goods, &c., were delivered by the plaintiffs, then being such forwarders and carriers aforesaid, to one Robert Maitland, then and at the time of the payment after mentioned being a wharfinger at the said city of Toronto, and thereafter by him to the defendants; and that thereafter (*quære*, after the account stated) the defendants, according to such custom and usage aforesaid, paid to the said Maitland, then being such wharfinger as aforesaid, and said Maitland then accepted and received of the said defendants the said several sums of money in the declaration mentioned, in full satisfaction and discharge thereof (*quære*, and all damages. Verification.

Special demurrer—grounds.

1. That in the said plea a local custom affecting forwarders and carriers by water of goods, &c., is stated to exist at the city of Toronto, binding on the plaintiffs as such forwarders and carriers, but does not state that the plaintiffs *had notice* of any such custom.

2. The second ground was not relied upon in the argument. It alleged the plea to be insensible in alleging a custom authorising the consignee of goods to pay freight and charges to the wharfinger *when not notified so to do*, whereas it should have alleged, when not notified *not so to do*.

It was not alleged that the defendants were *not* notified not to pay the wharfinger, &c.

Galt, for the demurrer, relied upon the objection that *notice* of the alleged custom ought to have been, and was not, averred: that, being a local custom, it constituted a matter of implied agreement, and that notice of the custom whence the agreement was to be implied was material to be alleged.

Leith, in reply, contended that *notice* was not necessary: that it was the alleged custom of the plaintiffs' trade, and

that they were bound to take notice of such a custom so affecting it; in short, that the averment of the custom and of the plaintiffs' trade virtually included notice.—*Stewart v. Aberdeen*, 4 M. & W. 211.

Galt, in reply, said the question was whether the payment as pleaded was good without any allegation of *notice*, and again urged that it was essential.

MACAULAY, C. J.—Upon referring to the case cited and others therein mentioned, I think that, assuming the alleged custom to be valid, *notice thereof* to the plaintiff, if not acquiescence therein, should be alleged. What would constitute evidence of such notice, if the fact was denied, is another question. It is set up as varying the promise implied by law to pay plaintiff on request, and virtually constituting a special contract between the parties, and binding on the defendant, that the defendant might pay the wharfinger, and yet it is not averred that the plaintiff knew of any such alleged local custom.—10 B. & C. 441.

There are other objections to the plea. In the first place, it is a question whether the custom, as alleged, must not be construed to mean a custom to pay the wharfinger the freight on delivery of the goods, and while he might be supposed to have a lien thereon, especially if furnished with a statement of the freight and charges by the forwarder or carrier; but at all events it cannot be construed to mean that, after the delivery of the goods without exacting payment, and it may be without knowing the charges for carriage, &c., and after the amount thereof had been ascertained by an account stated between the carrier and the consignee, the latter could go and pay the amount so ascertained to the wharfinger from whom he received the goods. If by the custom the wharfinger is the agent of the carrier, to receive the freight, &c., after having delivered the goods, and so delivered them without incurring any liability to the carrier for such freight by reason of such delivery, or until actually received, I do not think he is therefore his agent to receive payment of monies found due to such carrier, upon an account stated between him and the consignee after the delivery of such goods; because

the account stated was in respect of the carrier's claims for the carriage thereof.

The plea is to the whole declaration, including the account stated. Had that count stood alone the inapplicability of the plea would be more striking; but being partly pleaded thereto, it is bad in part, and consequently bad in toto.—Stephens' Pleading, 448.

To support the plea it must be allowed as a valid custom binding on the plaintiff without notice: that although a wharfinger had no directions to demand freight, or to hold the goods as subject to a lien therefor, he might exact freight notwithstanding at the time of delivery, or might deliver on credit, or without receiving payment of the freight, and without incurring any liability to the forwarder for the amount; and afterwards (although his duty as wharfinger had been performed and was at an end, and his own charges not paid) he continued the agent of the forwarder to receive payment for him at any future period, even after an account stated, unless the consignee was forbid paying him. It is virtually a custom entitling the wharfinger to deliver the goods, with credit for the freight, without incurring any responsibility, and yet entitling him to be regarded as still continuing the forwarder's agent and entitled to receive the amount. I question whether any such custom could be recognized in law. A custom to pay on delivery and while a lien for the freight remained, is quite another thing. If that is all the present plea amounts to it is bad, because the payment was not so made. If it means to set up a custom entitling the consignee to pay the wharfinger after the goods had been delivered and all lien gone, as being a continuing agent of the forwarder or consignor, I am not prepared to say such a custom could be sanctioned in law. At all events I am clear the custom, as pleaded, did not entitle the defendant to pay the wharfinger, without the plaintiffs' knowledge of such custom being averred, or after and in discharge of a sum found due upon an account stated between the parties.

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Judgment for demurrer.

DAVID TORRANCE, JOHN TORRANCE, AND LOUSON HILLIARD,
v. MARTIN PETER HAYES AND THOMAS HAYES.

Carriers and Wharfingers—Agency.

Assumpsit on the common counts for work and labor by plaintiffs, who were carriers by water. Plea, that a wharfinger, to whom the goods were delivered by plaintiffs for defendants, was the authorised agent of the plaintiffs to receive payment from defendants, and that they paid him accordingly. *Held*, from the course of dealing between the parties, as gathered from the evidence (reported below) that the wharfinger was the authorised agent of the plaintiffs to receive payment, as pleaded, on the delivery of the goods. *Held also*, that after delivery of the goods, without exacting freight, the wharfinger still continued plaintiffs' agent, to demand and receive the freight, till his authority was revoked, which was not till after payment in this case.

ASSUMPSIT—Work and labor by plaintiffs' servants and steamers, &c., in defendants' business, for the carriage of goods, &c., money paid, and on an account stated.

Writ issued 4th March, 1852. Declaration 13th March, 1852.

Pleas—1st. Non-assumpserunt and issue.

2nd. That at the time of the accrual of the said causes of action, one Robert Maitland, then and at the time of the payment afterwards mentioned, was authorised by the plaintiffs to receive payment from the defendants of the several sums in the declaration mentioned, and that while so authorised the defendants paid him, &c.

3rd. Special, and demurred to, and judgment for plaintiff on demurrer. (a)

Replication to 2nd plea—that said Maitland was not authorised by the plaintiffs to receive payment from the defendants of the several sums of money in the declaration mentioned; concluding to the country.

The particulars of plaintiffs' demand were for freight of goods from Montreal to Toronto.

The case was tried before Mr. Justice McLean at the last Toronto assizes, when the plaintiffs gave evidence to prove that they were owners of the steamer Ottawa, and had carried goods from Montreal to Toronto, which formed the subject of this action, to the amount of £8 3s. 5d., in July 1850, and of £26 11s. 2d. in November of the same year, amounting with interest to £37 10s.

(a) See page 274, ante.

That the goods were shipped through the plaintiffs' agent at Montreal ; by whom sent or to whom consigned was not known by the witness, but were apparently carried from Quebec as they were received, subject to charges for previous freight : that the plaintiffs brought up other goods for defendants, and delivered goods sometimes at one wharf and sometimes at another, when the freight was charged to the consignees: that these goods were delivered to Maitland, a wharfinger, and the freight charged to defendants, not to Maitland ; that when there was no arrangement to charge freight to the consignees, the plaintiffs felt at liberty to charge the same to either—i. e. the consignee or the wharfinger.

That the plaintiffs had an account with Maitland, as wharfinger, in the years 1848, 1849 and 1850 (but not in 1851), for freight of goods carried by plaintiffs and left with him as wharfinger : that the plaintiffs carried goods for the defendants in each of the years 1848, 1849 and 1850, and if so, must have received the freight through the wharfinger.

That the bills of lading were usually left with the wharfinger, shewing the amount of charges for freight, &c.; but he is only considered entitled to receive the freight when the goods are consigned to him, but had a right to detain the goods till paid.

That Maitland had not paid or credited the plaintiffs the freight in question, nor was it ever charged to him by the plaintiffs.

That in January 1851, the plaintiffs rendered an account therefor to the defendants, when one of them said it was correct, or that he believed it was correct, but that there was an unsettled account with Maitland, and they believed they had paid him : that plaintiffs understood the defendants' account with Maitland was still open and unsettled, and that the freight in question formed part of it ; but the plaintiffs thought defendants had notice before they settled with Maitland, although not aware that any notice had been given that the freight would be charged to them till after the goods were delivered : that one of the defendants

said he would have the account with Maitland settled, and if any balance, would pay it over to the plaintiffs.

This was in substance the plaintiffs' case; and the defendants' counsel moved a nonsuit, on the ground that no contract was proved: that the consignors were liable, and not the consignee, unless the goods were delivered to him under a bill of lading, charging the freight to him.

The application was declined, there being evidence, by defendants' admission, that the goods had been carried for them, that they were liable for the freight, and that the fact of payment was alleged and admitted; the only question being whether Maitland was agent for the plaintiffs, and entitled to receive such payment.

The defendants then gave in evidence, through Maitland and one of the defendants—

That during the years 1848, 1849 and 1850, the plaintiffs were in the habit of delivering goods, carried in their vessels, to Maitland the wharfinger, for parties in Toronto, including the defendants, with the manifests of the vessel, and charging the freight to the wharfinger: that he so received goods delivered from the Ottawa, up to 1851, when a system of cash payments was introduced: that before 1851 the freights were charged to the wharfinger, who received the amount from the owners on delivering the goods, and that plaintiffs were aware of this course of proceeding: that other goods came up by the Ottawa, and some for defendants, on which Maitland received the freights and accounted therefor to the plaintiffs; that defendants had paid him the amount of the freight on the goods in question, by giving their notes to cover freights and afterwards paying them.

That the manifest in the present instance was delivered to the wharfinger (Maitland), charging him with the freight: that at first it was supposed the goods were for another firm, the initial marks being nearly the same for both, but being ascertained to belong to defendants were delivered to them: that, as wharfinger, Maitland was supposed to have a right to retain goods till the freight was paid: that he collected large sums for plaintiffs, for freights on goods

brought up by them and left with him for defendants and others, precisely in the same manner as the goods in question.

Maitland claimed that the plaintiffs were indebted to him on account of the Ottawa, but said the accounts remained unsettled, and included salt, &c., and stated that he had given one of them a note for £118, in 1851, more than sufficient to cover the freight of the present goods : that he paid plaintiffs freights in November 1850, and believed the Ottawa had received credit for the amount of this freight (a).

The defendants (Hayes) said they had received many parcels of goods in 1848, 1849 and 1850, brought by the Ottawa and delivered through Maitland, to whom the freights were paid ; and on occasions he declined letting the goods go without the freights or acknowledgment of liability therefor : that goods had been received between the periods mentioned in the account of plaintiffs, and paid for to Maitland in the usual way, without question : and that defendants' did not know the owners of the Ottawa until one of them afterwards called with the present demand, several months after the amount had been paid to Maitland : that when goods are left with wharfingers freights are always paid to them, unless there is some specific arrangement on the subject, and they hold a lien upon the goods therefor, and there was no other arrangement in this case, and the goods had been always received through Maitland, and paid for to him without question, except on this occasion : and that defendants had no notice not to pay him till 2nd or 3rd November, after the amount had been paid : and that when called upon by the plaintiff, they distinctly told him that the amount had been paid to Maitland, and refused to pay it again : that defendants sometimes paid Maitland in money, at others gave promis-

(a) An account was filed of the Ottawa to Maitland, from May 1850 to February 1851, stating the amount of debt at £192 8s. 7d., and of credit at £264 19s. 11d., leaving £72 14s. 4d. due the steamer ; but the freight now charged was not mentioned, unless included in the £264 19s. 11d., which account was not produced. It was said in argument not to be included.

responsible to them as a principal, and in either event entitled thereto. If as a principal, no right of action accrued in the plaintiffs' favor against the defendants; if as agent, a right of action would accrue in the plaintiffs' favor (if not in Maitland's) against the defendants, in consideration of the carriage of the goods subject to freight, and their delivery to the consignees and owners, without payment thereof. And whatever responsibility Maitland may have incurred to the plaintiffs for delivering the goods to defendants without receiving payment of the freight (if under none before), I think the course of dealing and business between all the parties, as in evidence, went strongly to shew that the wharfinger, notwithstanding the delivery of the goods, continued the plaintiffs' authorised agent to demand and collect the freight of all goods carried by the plaintiffs' vessels, delivered to him as wharfinger, subject to freight and passing through his hands from the plaintiffs to the consignees. If Maitland, being plaintiffs' agent to demand and receive freight upon the delivery of the goods, ceased to be so after their delivery without receiving the freight, he would incur a personal responsibility to the plaintiffs for the amount, for having so parted with the possession of the goods, in waiver of the plaintiffs' lien for the freight. This might not have absolved the defendants from liability to the plaintiffs, if previously liable to them upon an implied promise to pay, as being the owners of the goods and in consideration of their carriage by the plaintiffs for them, the defendants, as both owners and consignees. But if not so liable previous to their delivery, the promise in fact to pay the freight, to be implied or inferred from the circumstances, would be to pay Maitland, who delivered the goods.—*Coleman v. Lambert*, (5 M. & W. 502).

If the defendants incurred no liability to pay freight to any one until the goods were received by them, their only liability would probably be to Maitland, and the plaintiffs would fail under the general issue; any subsequent admission by the defendants of liability to them, accompanied with assertion of payment to Maitland, being in that event insufficient evidence of an *assumpsit* on their part, if not wanting consideration and *nudum pactum*. If, on

the other hand, the defendants were *prima facie* liable to the plaintiffs, which I am disposed to think the correct legal, as it is a just, view of the case, then the course of dealing between the plaintiffs and Maitland on the one hand, and of Maitland and the defendants on the other, tends strongly to the conclusion that Maitland (having incurred liability to account to the plaintiffs for the freight by parting with the possession of the goods without receiving it, unless authorised by the plaintiffs so to do, which does not appear to have been the case) continued to be authorised or entitled to collect the freight for his own protection, or on his own account, if not as the plaintiffs' agent. But upon the whole evidence, it seems the reasonable inference that a discretion was vested in Maitland by the plaintiffs to withhold or to deliver goods received by him as wharfinger from the plaintiffs' vessels, subject to freight and their lien therefor; and that, although he delivered them to the owners or consignees without exacting its payment on delivery, he continued the agent of the plaintiffs to demand and receive the freight, until his authority was revoked by notice from the plaintiffs. Such notice was not given in this case until after the freight had been paid by the defendants to Maitland, according to the pleadings and evidence. This appears to have been the general and established course of conducting the business. I think therefore that there should be a new trial, but only on payment of costs; it being a question mainly of fact for the jury, and left to them by the learned judge.

It is true he expressed himself strongly in favor of the defendants as to the just conclusion for the jury to come to, but he did not direct them to find for the defendants, nor indeed do I see that he ought. I think the rule should be made absolute, on the ground that the evidence preponderated so strongly in favor of the defendants that the case ought to be submitted to another jury, if the defendants desire it, on the terms mentioned; otherwise the rule will be discharged.

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule absolute on payment of costs.

***In re* JOHN SELLS AND THE MUNICIPALITY OF THE VILLAGE
OF ST. THOMAS.**

*Municipal by-laws creating debts, &c.,—what they must contain—14 & 15 Vic.
chap. 104, sec. 4.—Equality of annual rate in amount.*

The statute 14 & 15 Vic. chap. 109, sec. 4, prescribing what municipal by-laws creating debts, &c., shall recite and set forth, is only *directory*, and does not declare that the omission of any of the prescribed recitals in any such by-law shall render the by-law invalid or void.

The rate to be levied by any municipal council for the payment of a debt or liquidation of a loan, &c., must, under the municipal acts, be *equal* in each successive year, and not fluctuating according to the arbitrary discretion of the municipality.

This was a rule calling upon the municipality of the village of St. Thomas to shew cause why the by-law No. 24 (set out hereinafter) of the municipality of the said village, passed the 10th of July 1852, should not be quashed, upon the grounds—

1st. That the said by-law omitted reciting in the preamble the amount of the whole ratable property of the said village, according to the assessment returns for the same for the then next preceding financial year.

2nd. That the annual rate in the pound in the said by-law specified was not computed upon the amount of the whole value of the said ratable property, according to the assessment returns for the then next preceding financial year, but upon some other and different amount.

3rd. That the special rates in the said by-law, if referred thereto, as they ought to have been, were not sufficient to satisfy and discharge the debt or loan thereby created, with the interest, on the days and times appointed therefor in the said by-law, and in the debentures issued under the same.

4th. That the ratable property recited was alleged to be the amount of the ratable property for the year 1852, and not alleged to be the *whole* thereof.

5th. That the rates in the pound were founded thereon instead of the ratable property for the year 1851.

6th. That there were several distinct unequal rates in the pound, mentioned in the schedule to the said by-law, instead of one equal and uniform rate.

7th. On grounds disclosed in affidavits, and papers filed.

This rule was granted upon proof of the by-law No. 24, which was—"For raising by assessment the sum of £703 and interest, to defray the expenses of purchasing the town hall property in the municipality of the village of St. Thomas"—Passed 10th of July 1852. It recited the expediency of raising by way of assessment the sum of £703 8s. 2d., for the purpose of defraying the debt incurred in the purchase of a town hall for the municipality of the village, and that it would require £815 17s. 1½d., to be raised as a special rate, for the payment of the said debt and interest then due thereon, and interest on the said sum for the four years and nine months from the 1st of April 1852 to the 1st of January 1857; and that the amount of the ratable property of the said municipality amounted to £5978 7s. 6d., assessed value for the year 1852; and it would require the several rates in the pound mentioned in the schedule annexed thereto, and forming part of such by-law, to be levied upon such ratable property as a special rate, for the payment of the principal and interest of such debt according to the requirements of the 177th sec. of the 12th Vic. chap. 81; and therefore enacted, that it should be lawful for the said municipal council to raise by assessment on the taxable property of that municipality the several sums mentioned in the schedule annexed in the several years therein mentioned, to be collected in the same manner as other taxes. &c.; and that the special rates enumerated in the said schedule should be raised, &c., over and above all other rates for the years therein mentioned, upon all ratable property in that municipality, for the purpose of paying the said sum of £815 17s. 1½d.; and that the proceeds of such special rate should be so applied, &c.; and that the said sum of £815 17s. 1½d., when so paid to the said treasurer, should be appropriated towards defraying the expenses of the aforesaid purchase, &c., and to no other purpose; and that such by-law should take effect and come into operation on the 13th of July 1852.

| | | | | | | | |
|---------------|----|---|----|---------------|------------------|----|-----|
| SCHEDULE—1852 | £0 | 1 | 0½ | in the pound, | £311 | 3 | 11½ |
| 1853 | 0 | 0 | 4½ | do. | 111 | 18 | 4½ |
| 1854 | 0 | 0 | 4½ | do. | 118 | 1 | 2 |
| 1855 | 0 | 0 | 4½ | do. | 119 | 1 | 7½ |
| 1856 | 0 | 0 | 6½ | do. | 155 | 11 | 11½ |
| | | | | | <hr/> £815 17 1½ | | |

(Signed),

BEN. DRAKE, *Presiding Councillor.*
JAMES STANTON, *Clerk.*

It was represented by the affidavits filed, that the applicant, Sells, had a sufficient interest, &c.

That the municipality was for the first time incorporated on the 1st of January 1852, and composed of portions of the townships of Southwold and Yarmouth.

That the amount of the ratable property in that portion of Southwold in the year 1851, according to the assessment roll, was £4,565, and in that portion of Yarmouth for the same year, £57,636 5s. 0d., together £62,201 5s. 0d.; and that there was no other assessment roll for the year 1851 applicable thereto, a certified extract from which was furnished to Dr. Southwick, returning officer at the first municipal election in 1852, and deposited by him in the clerk's office.

That the above amounts are the *actual* value at which the rates were assessed, and that the *annual* value of the same is in all £3,732 1s. 6d.

That the amount of the whole ratable or taxable property within the said municipality of the village of St. Thomas, was in the financial year 1852, according to the assessment roll, £103,089, and the annual value thereof according to the said roll, £6,185 2s. 7d., but that the amount of ratable property set forth in the said by-law, viz., £5,978 7s. 6d. purports to be for the said year 1852.

That the by-law was not specially promulgated, &c.: that it was read twice in April before the draft was published and only once afterwards, and was passed irregularly in that respect: that the municipality had issued five debentures on the authority of the said by-law, &c.

Mr. White, the town clerk and treasurer, stated, that in February 1852 the amount of property rated on the assess-

ment rolls for 1851 was used by the council as a guide in purchasing the town hall, &c.

Vankoughnet, Q. C., shewed cause, and contended—

1st. That as the village was not incorporated till January 1852 there could be no assessment roll therefor for the previous year within the meaning of the statute 14 & 15 Vic. chap. 109, sec. 4; and that it was not necessary to refer to or adopt extracts from the assessment rolls for Southwold and Yarmouth.

2nd. That the by-law conformed to the statute in spirit and effect.

3rd. That the omission was but matter of recital, and the rates were duly imposed upon all ratable property as the act requires, which answers all the objections but the last.

4th. That the acts do not require equal yearly rates, so that debts are paid off within twenty years: that the term *equal* is not used, only yearly rates, and that equality of such yearly rates could not be inferred.

Macdonald, in reply, argued—

1st. That the statute peremptorily required the by-law to contain a recital of the last year's assessed value: that it was essential to the validity of the by-law; and if not otherwise practicable the rates for Southwold and Yarmouth, so far as related to the present incorporated village, should have been adopted; and that the statutes differing in the mode of rating in townships by the full value, and in towns by the yearly value, made no difference.

He referred to 14 & 15 Vic. chap. 109, sec. 9; also to secs. 4, 5, 6, 7, 8, 10, 11 and 12, and schedule A. No. 24, as shewing that however based, apportioned or declared, the rate must be an equal yearly rate if extended, as in this case, over several years; the act requiring the full amount to be at all events realized in twenty years, according to that mode of rating—12 Vic. chap. 81, secs. 177, 144, 180, 207; and 14 & 15 Vic. chap. 109, sec. 36, and schedule A, Nos. 21 and 24.

MACAULAY, C. J.—The 12th Vic. chap. 81, sec. 177, and the 14th & 15th Vic. chap. 109, schedule A, No. 24, enact that it shall be the duty of the municipal corporations

respectively to cause to be assessed and levied upon the whole ratable property in their towns, &c., a sufficient sum of money in *each year* to pay all debts incurred, or which shall be incurred, with the interest thereof, which shall fall due or become payable within such year and that no by-law thereafter to be passed for creating any such debt, or for contracting any loan, shall be *valid* or effectual to bind any such corporations unless such by-law shall contain a clause appointing some day within the financial year in which such by-law shall be passed, for the same to take effect and come into operation; nor unless the whole of such debt or loan shall by such by-law, &c., be made payable within twenty years, &c.; *nor* unless a *special rate per annum*, &c., shall be settled in such by-law, to be levied in *each year* for the payment of such debt or loan, with the interest thereof; *nor unless* such special rate, according to the amount of rateable property in such town, &c., as such amount shall have been ascertained by the assessment returns for such town for the financial year *next preceding* that in which such by-law shall have been passed, shall be sufficient to satisfy and discharge such debt or loan, with the interest thereof, within twenty years at the furthest, from the time appointed for such by-law to take effect, &c.

The 14th & 15th Vic. chap. 109, sec. 4, enacts, that in every by-law for creating a debt or contracting a loan there shall be recited or set forth (among other things), thirdly, the amount of the *whole ratable property* of such town, &c., according to the assessment return for *the same* for the the next preceding financial year; and fourthly, the *annual* rate in the pound upon *such ratable property* required, &c., according to the 177th sec. above mentioned.

The 13th & 14th Vic. chap. 67, sec. 10, fixes the taxable or financial year; sec. 11 establishes different modes of rating in townships, &c., and incorporated towns—in the former, upon estimate of the amount required—in the latter, by a *yearly rate* in the pound on the *yearly value* of all taxable property. By the same section the yearly value of taxable personal property is declared to be six per cent. on

the assessed actual value thereof; and by sec. 13 the yearly value of real property in towns, &c., to be the real rack-rent or full yearly value thereof, &c., for each tenement and one-fourth of an acre of land, and if vacant lands, six per cent. upon the full actual value. The note at the end of schedule B. declares that the yearly value of real property should be set down in towns, &c., and the actual value in other places.

This shews that a different system prevails in assessing townships and incorporated towns, &c.; and as St. Thomas only became incorporated on the 1st of January 1852, the assessment returns for the previous year of those portions of Southwold and Yarmouth would not exhibit the amount of the ratable property as an incorporated town, and it was consequently impossible to comply with the statute requiring such recital. They adopted a course equally just and safe; and as the statute is only directory and does not declare that the omission of any of the prescribed recitals shall render a by-law invalid or void, I am not disposed to think the objections taken on this head fatal—and all the objections but one seem to relate thereto.

The last and main objection is the want of an *equal yearly rate*: and the 12th Vic. chap. 81, sec. 177, proviso at the end; the 14th and 15th Vic. chap. 109, schedule A, No. 24, and sections Nos. 4 to 12; and 12th Vic. chap. 124, tend to shew that the special rate per annum to be levied in each year, creating a sinking fund, and sufficient in amount to realize the debt or loan within twenty years, means an equal yearly rate; otherwise an arbitrary distribution of the burthen might be made, and numerous debts be deferred and loaded upon municipalities at distant periods.

The statutes say a special rate per annum to be levied in each year—not *special rates* to be yearly imposed—but a rate indicative of uniformity—*Grierson v. Municipal Council Ontario* (9 U. C. R. 623). This is, I think, further shewn by that part of the 177th sec. at the end, and the 4th sec. of the 14th & 15th Vic. chap. 109, which requires reference to be had to, and the rate to be based upon the amount of the ratable property for the next preceding

financial year, specifying the annual rate in the pound upon such ratable property, required as a special rate for the payment of the interest, and the creation of a sinking fund for the payment of the principal of any debt or loan, according to the requirements of the 177th section of 12th Vic. chap. 81, irrespective of any future increase of the ratable property of the town, &c.; and by the following sections, including section 10, providing for the reduction of such rate, under the circumstances therein stated. The rate is throughout spoken of as a rate, not rates—implying uniformity, although for two objects—namely, the payment of the interest becoming due annually, and a sinking fund to defray the principal when that shall become due. The reference required to be had to the amount of assessment for the preceding year tends strongly to shew that an equal yearly rate based thereon was intended.

I think the whole spirit of the statutes shew that whatever the rate is it must be equal in each successive year, and not fluctuating according to the arbitrary discretion of the municipality creating the debt, or raising the loan and passing the by-law for the liquidation thereof. See 14 & 15 Vic. ch. 109, sec. 35, and schedule A, No. 21, as to costs.

As to the power of the municipality to provide for a town hall, &c., see 12 Vic. chap. 81, sec. 31, No. 2, sec. 59, and sec. 67.

MCLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule absolute.

SANDERS ET UX. V. JANETTE AND OTHERS.

Will—Construction—Estate devised—Fee or life?

A testator by his will made before the 4th Wm. IV., ch. 1, and written in French (a translation of which was before the court), after devising to his wife "the full enjoyment of all his goods, property (*biens*) real and personal moveables and immoveables of what nature or kind they may be during her life," then proceeded, "I will and order, that after the decease of my wife Agatha, *all my goods, property (biens), aforesaid, whatever they may be*, be divided, and owned equally among all my children—viz., B., C., D., P. and N., J. B. and F." *Held*, that the devisees were tenants in common in fee, and not merely for life.

DOWER for the one undivided sixth part of lot 77 in the

first and second concessions, and lots 78 in the second and third concessions of Sandwich, by Cornelia Sanders, who was the wife of Pierre or Peter Janette, deceased.

The pleas were—

1st. By all defendants—Pierre Janette not seized.

2nd. By Charles Janisse, one of the defendants—that he was solely seized of 160 acres, parcel, &c.

3rd. By Narcisse Janette—that he was solely seized of three acres, parcel, &c.

By all but Ranette Janette—no seizin in Pierre in residue of lands.

The plaintiffs took issue upon these pleas.

At the trial at the last Sandwich assizes, 22nd October 1852, before Mr. Justice McLean, it was admitted that devisor Tourneant died seized of the lands in question, and that he made a will, a copy of which was filed and admitted in evidence, leaving these lands to Pierre Janette and the defendants. The will was in French, and the copy filed and before the court was a sworn translation. There was a deed from the testator to one or two of the defendants put in evidence by them, and admitted by the plaintiffs; and by the direction of the learned judge, and by consent of the parties, a verdict was taken for the plaintiffs subject to the opinion of the court upon the construction of the will, a copy of which was filed—the particular portions of land in question being understood between the parties in the event of the plaintiffs succeeding.

If the court should be of opinion that the will passed to Pierre Janette such an estate as would endow his widow, then the verdict to stand, if otherwise, verdict to be entered for the defendants.

No deeds appeared with the papers delivered to the court.

The will of Jean Baptiste Tourneant was dated the 30th of December 1827, and the testator, by clause third, wished his debts to be paid and his wrongs repaired (if any), and then proceeded.

4th. "As to the goods with which it has pleased Divine Providence to bestow on me, I wish that my dear wife may have and I leave unto her the full enjoyment of all

my goods (property), real and personal, moveables and immoveables, of what nature or kind they may be, during her life."

5th. "I will and order, that after the decease of my dear wife Agatha, *all my goods* (property) *aforesaid, whatever they may be*, be divided and shared equally amongst all my children—viz., to Basil, Charles, Dominique, Pierre and Narcisse, Julie, Renette and Felice; and that in case that my son Charles, to whom I have sold, happens to have received more than his share, he shall be compelled to bring to the heap in the same manner: that, having not received enough, he shall be reimbursed of the deficit that which may be seen by the papers between him and me, which must remain in all their validity—it being well understood that he shall not be compelled upon the whole to make up any deficit but only according to the division, as above stated."

6th. He devised to his son Narcisse the land he then occupied, specially describing it; also the pear orchard on the other side of the road, except six pear trees which he saved for "my wife and our heirs:" "this grant and gift made in consideration of £62 10s. 0d., which he shall be obliged to account for at the partition which is to be made after the decease of my wife, and if this sum exceeds his share he shall be obliged to bring to the mass the overplus as well as receive therefrom if he has to claim more."

Then he appointed executors, and revoked all former wills, &c.

Beecher, for the demandants, contended that the French term in the will is "*biens*," which means not only goods but property of all kinds—as shewn by what follows in the 4th clause of the will—real and personal, moveables and immoveables, of what nature or kind they may be.

That the 5th clause referring to the 4th by the words "goods aforesaid," has a like import, and therefore includes all the estate, real and personal, and devises the same absolutely, so that the devisees take the real estate in fee, and as tenants in common, as clearly shewn by the equal division and share to be taken by the devisees—wherefore

the widows of any such tenants in fee in common were entitled to dower. He referred to Powell on devises, p. 418, as to the force of the word "property," and p. 370 as to the tenancy in common.

Cooper, for the tenants, was disposed to concede that if the devisees in the 5th clause took in fee, or whatever estate they took would be as tenants in common, but contended the will only gave them a life estate and not the fee: that the mention of goods or property in the 4th clause had relation to the *corpus* or identity of the subject matter devised, so as to designate it and not the estate of the devisor therein, and that the allusion thereto in the 5th clause must be regarded as of like import and meaning: wherefore, the will being made before the provincial statute 4 Wm. IV. chap. 1, imported only an estate for life to the children, devisees in the 5th clause; and that it was no, equivalent to a limitation, as if the will had devised the property to the wife for life, remainder to the children in fee—2 Powell on devises, 417, and the case of *Roe ex dem. Bowes v. Blackett*, Cowp. 235.

He also referred to the mention of heirs in the 6th clause, as evincing that the devisor contemplated intestacy as a possible event.

Beecher, in reply, referred to the deeds, as in evidence, and admissible in aid of the construction of the will, and as supporting the conclusion for which he contended; also, that the 6th clause, as well as the 5th, imposed pecuniary charge on the sons Charles and Narcisse, under certain contingencies, and strengthened the argument that according to the true intention of the devisor the fee should be held to have been devised to be divided or shared equally amongst the devisees.

MACAULAY, C. J.—The words "all my property (*biens*), real and personal, moveables and immoveables, of what nature or kind they may be," in the 4th clause of the will, seem to me to relate to the testator's estate or interest therein, as well as to the subject matter in point of identity, and therefore equivalent to the words used in the case cited from Cowper 235, *Roe ex dem. Bowes v. Blackett*, where

the testator devised to his wife all his freehold and leasehold houses, lands and tenements, situated at Newenham and elsewhere, *and all his estate and interest therein*, for and during her natural life (a).

Then the words in the 5th clause, "all my property (*biens*) aforesaid, whatever they may be," are of like meaning with those used in the 4th clause to which they refer, and import the whole residue of his property, real and personal, and have therefore the same force that the will would have had in the case cited from Cowper, if the words "*all my estate and interest therein*" had in the devise to the testator's sisters after his wife's death, been inserted or repeated after the words "houses, land and tenements," which they were not. Lord Mansfield said, the words "*all my estate and interest therein*" added, precedent to an estate for life, could have no meaning at all, and being left out in the devise to his sisters, shewed that the testator meant nothing by using them.

But it is otherwise here ; and I look upon the 5th clause as if repeating the language used in the 4th.

This construction is strengthened by what follows in the 5th clause respecting the previous sale to Charles, and in the 6th respecting Narcisse. Both import absolute estates in them, and shew that in the equal division and shares among all his children, spoken of in the 5th clause, he means to give estates in fee, or his whole interest, and that they were to take as tenants in common and not as joint tenants, is, I think, equally clear.

I think we best fulfil the manifest intention of the testator by adopting this construction, and that the construction contended for on behalf of the defendant would frustrate, and not fulfil his intention. Consequently I think the plaintiff is entitled to recover.—*Loveacres v. Blight* (Cow. 355), *Dean ex dem. Gaskin v. Gaskin* (ib. 657), *Doe ex dem Pile v. Wilson et al.* (6 C. & P. 301), much in point, *Sharp v. Sharp* (6 Bing. 630, 4 M. & P. 445), *Doe ex dem. Hickman v. Hazlewood* (6 A. & E. 167), *Roe ex dem. Shell v. Patterson* (16 East. 221), *Doe ex dem. Pratt et al.*

(a) See the late case of *Burton v. White*, 7 Ex. 720.

v. Pratt (6 A. & E. 180), Doe ex dem. Knott v. Lawton et al. (4 Bing. N. S. 455), Roe ex dem. Allport v. Bacon (4 M. & Sal. 366).

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Judgment for plaintiffs.

BROUGHAM V. BALFOUR.

Trespass, q. c. f. by tenant against landlord—Leave and license, &c.

Trespass q. c. f. Plea—*liberum tenementum*. Replication—demise to the defendant from the plaintiff from year to year. Rejoinder—"that after the demise it was consented and agreed that the defendant and his servants, &c., should have leave to pass and re-pass in and on the close, in which," &c. Held, that to support this rejoinder, a written agreement at least, if not one under seal, should be proved.

The defendant also rejoined, that after the license from the plaintiff to cross the close, &c., the plaintiff, without any notice to him (defendant), of his intention to lock the gates of the said close, did lock and fasten the said gates, and that the defendant broke the same, as he lawfully might. *Quare*, the sufficiency of this plea.

TRESPASS. Declaration—1st count, *quare domum fregit*, and assault to the plaintiff.

Pleas—1st. Not guilty to the whole declaration.

2nd. Not possessed.

3rd. *Son assault demesne*.

4th. *Liberum tenementum*.

5th. That plaintiff *vi et armis* took the goods of one George Burrell, and put the same in the house in which, &c.: that Burrell, and the defendant as his servant, peaceably, &c., entered the house to re-take the said goods, as they lawfully might.

Replication—to the 1st and 2nd pleas, *similiter*, and issue; to the 3rd plea, *de injuria*; to the 4th plea, a demise from the plaintiff to the defendant from year to year; to the 5th plea, *de injuria*.

Rejoinder to the replication to the 4th pleas—leave and license—*similiter* and issue to the others.

Surrejoinder—traverse of leave and license, and issue.

Declaration—2nd count, *quare clausum fregit*.

Pleas—1st. General issue to the whole declaration as above. 2nd. Not possessed. 3rd. *Liberum tenementum*.

4th. That the defendant demised the close in which, &c., from year to year, reserving thereout a right to himself and his servants, &c., to pass and re-pass upon said close, for the purpose of going from the adjoining close to a highway, at all times, &c.; and because said close in which, &c., had been at said times, &c., improperly fastened, he, the defendant, for the purpose of passing over the plaintiffs' close, removed the gates, &c.

Replication—to 1st and 2nd pleas, *similiter*; to 3rd plea, a demise from the defendant to the plaintiff from year to year; to the 4th plea, a traverse of the reservation stated in that plea.

Rejoinder to the replication to the 3rd plea—"that after the said demise the plaintiff *consented* and *agreed* that the defendant and his servants, and all others having business with him, should at all times have leave to pass and re-pass across, along, over and upon the said yard and close in which, &c., by reason whereof he and they were used and accustomed so to do, and did pass and re-pass at their free will and pleasure; and that at the said times when, &c., because the said gates in the said second count mentioned had been, and were fastened with staples and locks by some person to the defendant unknown, without any notice to the defendant from the plaintiff of his intention to fasten the same, the defendant, in order to pass over the said close as he had been accustomed to do, removed the said staples and locks from the said gates, as he lawfully might, for the cause aforesaid, doing no unnecessary damage, &c., which are the trespasses in the said replication alluded to," &c. : Verification.

Surrejoinder traversed the rejoinder, and alleged that the plaintiff did not consent and agree that the defendant, his servants, &c., should have leave to pass across, along, or upon the said close in which, &c., in that rejoinder mentioned *modo et forma*—to the country and issue.

New assignment—That the plaintiff instituted his action for other trespasses than those attempted to be justified.

Pleas—1st. Not guilty; 2nd, "as to breaking and entering the close in which, &c., and breaking the gates, &c.,

at the said times when, &c., therein mentioned, that for a long time before, and until the said time when the defendant, his servants, and all others having business with him, had been, and were by and with the consent, leave and license of the plaintiff, used and accustomed to pass and re-pass along, over and upon the said close which, &c.; and that the defendant before the newly assigned times when, &c., for his own convenience, had put and placed the gates in the said new assignment mentioned upon the said close in which, &c., in the said new assignment mentioned; and because at the said times when, &c., the said gates had been improperly fastened, locked and barred by the plaintiff, without any notice whatever to the defendant of the plaintiff's intention to do so, he, the defendant, for the purpose of passing through the said close in which, &c., as he always had been used and accustomed to do, broke the said staples, and entered the said close in which, &c., which he lawfully might for the cause aforesaid, which are the same trespasses newly assigned: verification.

Replication—that the defendant, at the said several times when, &c., of his own wrong, and without the consent, leave and license of the plaintiff to the defendant or his servants, &c., to pass or re-pass across the said close in which, &c., committed the trespasses in manner and form as by the plaintiff newly assigned—concluding to the country and issue.

To the replication of a demise to the plea of *liberum tenementum* (4th) to the first count, the defendant rejoined, “that he, at the said time when, &c., (not saying, like the declaration and replication, the said *several* times when, &c.,) by the leave and license of the plaintiff to him for that purpose first given and granted, entered the said house in which, &c., and committed therein the trespasses in the said replication alluded to, as he lawfully might, for the cause aforesaid: verification.

Surrejoinder—that the defendant, at the said several times when, &c., of his own wrong, and without the leave or license of the plaintiff, committed the trespasses in the

said replication mentioned *modo et forma* alleged, &c.—concluding to the country and issue.

It appeared in evidence that the plaintiff was a tenant of the defendant of a house and yard, having entered into possession under an agreement (not produced) for a lease for several years, which lease had not been granted, but that the plaintiff had been in possession upwards of a year, and had paid rent as a yearly tenant, and had therefore become tenant from year to year: that the defendant resided in a house near the one thus occupied by the plaintiff: that the yard (which had at first been open) had from the beginning of the plaintiff's occupancy been used by both the plaintiff and defendant as a common access to their houses and stables, the approach to the defendant's house, or to his stable through the yard, being more convenient than by another road that was open to him: that after the plaintiff had so become tenant of the defendant, the defendant, with the plaintiff's assent, at all events without his objecting thereto, erected a gate across the entrance into the yard, the better to secure it: that after the yard had been thus used in common, some disagreement arose between the parties, and that in order to exclude the defendant the plaintiff had put a lock upon the gate, or had caused it to be locked against the defendant; and that the defendant's servant, who had entered the yard one Saturday evening apparently by some other way, and put up a horse of the defendant's which he had been using, afterwards heard that the gate was locked, and wantonly broke the lock and entered the yard by force, and this by the authority and direction of the defendant.

It further appeared that the plaintiff and the defendant being brothers-in-law, were in the habit of amicable intercourse until the disputes arose between them: that on the Sunday after the gate was broken the defendant entered the plaintiff's house against his will, in company with the brother of their wives, and while there, had menaced the plaintiff with a whip, but without striking him.

This entry was the trespass to the house complained of in the last count. The menacing with the whip was the

assault therein mentioned ; and the breaking the lock of the gate and entering the yard on Saturday night was the trespass complained of in the second count.

At the trial, the parties were examined, each on his own behalf in addition to their respective witnesses.

There was evidence to go to the jury to prove the trespasses complained of—although it was more or less conflicting—especially in relation to the alleged assault, and how far the defendant had done anything amounting to an assault.

The learned judge (McLean, J.,) before whom the cause was tried at the last Toronto assizes, charged the jury that the only injury proved was in the breaking of the padlock or staple, and that as to that, plaintiff's right to recover must depend upon the fact of his being entitled to the possession of the yard to the exclusion of the defendant ; for, that if the defendant reserved, as he swore he did, the right of passing over the yard to his stable, then the part alleged to have been broken of the close could not be in the plaintiff's exclusive possession so as to entitle him to maintain an action against a person as much entitled to enjoy it as himself : that if by the terms of the plaintiff's agreement he was entitled to the exclusive possession of the entrance into the yard, then, though he might have permitted the defendant to use it without objection for a time, he had a right at any time to withdraw his assent ; and that his putting a lock on the gate would clearly put an end to any tacit assent of the plaintiff on which the defendant might have acted, and after that the defendant would not be justified in opening the gate or breaking the locks or fastenings ; and that, having directed them to be broken, he would be responsible for it as a trespasser : that as to the first count, for breaking and entering the plaintiff's house, the defendant pleaded that he entered by the plaintiff's leave and license, but that the reverse was shown by the evidence, which established that the plaintiff forbade the defendant and Burrell entering, and that he threatened to shoot the first who should enter : that, strictly speaking, the entry into a dwelling-house contrary to the express order of the owner must be regarded as a trespass, even

though no injury should arise from it: that as to the alleged assault, he thought the weight of evidence much in favour of the defendant. He told the jury that it would only confuse them to attempt to direct them as to the finding on each particular issue, and submitted the following points for their consideration:—1st. Had the plaintiff the exclusive right to the way on which the gate was, and did the defendant break the locks and fastenings of the gate? 2nd. Did the defendant enter the plaintiff's dwelling-house by violence, against the plaintiff's will? and 3rd. Did the defendant assault the plaintiff when he entered?

The jury found for the plaintiff on all the points referred to—that the plaintiff had the right to shut up the way, and the defendant broke it open, and the defendant entered the plaintiff's dwelling-house with force and assaulted the plaintiff.

The jury found for the plaintiff £3 damages, £2 of which they stated to be for the trespass to the house and assaulting the plaintiff, and £1 for the trespass to the yard and breaking the gate.

Bell, for the defendant, obtained a rule last term, calling upon the plaintiff to shew cause why such verdict should not be set aside, or a new trial be had, as being against law, evidence, and for misdirection—meaning by the latter that the learned judge who tried the cause did not, as he should have done, direct a verdict for the defendant on the issues to the new assignment—one act of trespass only being proved to the yard, which was covered by the prior pleadings to the second count—or for leave to enter a verdict for the defendant upon all the issues to the new assignment, or for the defendant upon the plea of leave and license.

Hallinan, for the plaintiff, shewed cause, and contended the rule must fail, because there was evidence to support the first count; and as to the second, that the defendant was proved to have habitually passed across the plaintiff's yard—the exclusive possession or right to which the jury found to be in the plaintiff—so that the only plea to the second count that was tenable was the plea of leave and

license, apart from which, the defendant was without defence for all the various entries into the yard that appeared in evidence—1 Saund. 300, *e*; and the only wrongful entries, or entry after revocation of the implied license afforded by the facts in evidence, was on the Saturday night and was properly applied to the new assignment: that, if anything, the defendant was entitled to a verdict on the plea of leave and license to the second count, but the rule did not ask that, but related only to the pleadings and issues under the new assignment.

Bell, in reply, read the terms of the plea of license to the new assignment, and said it was not strictly a plea of leave and license in the usual form—and that only one trespass to the yard being proved all other entries were out of the case—and excess not being replied, it was for the jury to say whether the plea was not sustained, however the defendant might have exceeded what he was justified in doing: that the general right to go on the yard only was left to the jury—not whether it existed and was exercised at the time when, &c., and upon the occasion in question, as pleaded.

The following cases were cited in argument—*Oakley v. Davis*, 16 East. 86; *Alston et al. v. Mills*, 9 A. & E. 248; *Norman v. Wescombe*, 2 M. & W. 360; *Darby v. Smith*, 2 Moo. & Rob. 184, Tyr. Plg. 662, 668; *Pugh v. Griffith*, 7 A. & E. 827.

MACAULAY, C. J.—The jury have found that in the demise from the defendant to the plaintiff the defendant did not reserve a right for himself and servants to pass and re-pass, &c., as in the 4th plea to the 2nd count alleged and traversed by the replication thereto.

The evidence did not support the rejoinder to the replication of a demise to the third plea of *liberum tenementum*, because, being after the demise, and by way of agreement, and not mere leave and license, and the whole plea being put in issue by the surrejoinder traversing the same, a written consent at least, if not one under seal, or founded on mutuality of consideration, so as to support it as an agreement respecting an interest in lands or an easement,

was necessary, and no such proof in writing was given (a). The jury, moreover, found that the defendant had not the leave and license of the plaintiff at the time when he broke the staple, &c., of the gate, to enter the yard, &c. The whole of the second plea to the new assignment is traversed by the replication of *de injuria*; and there was evidence to shew that any prior license that might have existed before the gate was forced open, as in evidence, had been revoked, and that the defendant knew it: that he knew the gate was locked against him so as to prevent his entry, and therefore that he so forced the gate and entered wrongfully.

I question whether the plea is not bad on the face of it as failing to shew a sufficient justification for breaking the staple and forcing the gate, and entering the yard, as it admits; for it was obvious that, assuming a prior leave and license, the very act of locking the gate put an end to it. The plea admits that the plaintiff had locked it, and relies upon the want of notice as his justification for breaking it; whereas it behoved him to ascertain whether he had the plaintiff's leave so to force it before he did it, inasmuch as there was no previous license to break in; and if doubtful who had locked the gate, the defendant should have informed himself before he broke the staple, &c.

It appears to me the way the case was left to the jury was as favourable to the defendant as the plaintiff—namely, whether the defendant had reserved a right of passage, or whether a license to pass and re-pass had been granted; and the jury having found for the plaintiff generally, must be taken to have negatived both.

The verdict appears right upon the evidence applied to the merits—and does not seem to be one which it would be proper to disturb—upon the strict point of, whether a leave and license down to a certain period had not existed, both as to visiting the house and entering the yard, even if ground for objection existed on this head, for it is clear that no such leave was granted at the times complained of,

(a) *Ruffy v. Henderson*, 16 Ju. 84, 21 L. J., Q. B. 49.

and for which the plaintiff has the verdict, and that the defendant must have known it. And the case of *Barns v. Hunt* (11 East. 451) shews that a plea of leave and license traversed by the replication of *de injuria* requires the defendant to prove such leave and license to all the trespasses proved by the plaintiff, without a special replication alleging a revocation of a once existing license, and new assigning subsequent trespasses, although such a mode of pleading is not unusual, and is sanctioned by the case of *Andrews v. Adams* (15 Jur. 149, and 15 Q. B. 285, S. C.)

MCLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged.

THE QUEEN V. MEYERS.

What streams are public highways—Obstruction—Indictment—Variance.

Indictment for a nuisance in obstructing the North Sydenham river and Queen's highway, by erecting a dam near lot 16, 18th concession of Sombra. The evidence shewed the river in question to be affected by the waters of the St. Clair—to be navigable much higher up than the defendant's dam at some seasons—and at all seasons for some miles above it: that vessels and boats of a certain size had, before the erection of the dam, passed without obstruction to a point higher up the river than the part where the dam was erected, though it did not appear to have been used to any great extent higher up the river than what was called the head of the navigation—a point below the dam. *Held*, that upon such evidence the jury were warranted in finding the stream to be a public navigable water-course.

The indictment alleged the nuisance to be near the lot 16, and the evidence shewed it to be on it: *Held*, a fatal variance.

This was a case reserved from the last spring assizes from the united counties of Essex and Lambton.

The indictment stated that a certain part of the river North Sydenham, lying and being in the township of Sombra, “is, and before the obstruction after-mentioned had been a navigable river and Queen's common highway for all her Majesty's subjects, with ships, schooners, barges, rafts, steam-boats, and other boats and vessels, to navigate, sail, run, pass, re-pass and labour, without any impediment or obstruction: that the defendant on the 1st of December 1849, and on divers other days between that day and the

taking of this inquisition, *vi et armis*, at the township aforesaid, in the county of Lambton, unlawfully, &c., did erect, fix, put and place, and set in and across the said river and Queen's common highway, *near* a certain piece of land called lot No. 16, in the 13th concession of the said township of Sombra, a certain dam composed of timber, logs, brush, clay, &c.; and the said defendant, on the day and year aforesaid, and on divers, &c., *vi et armis*, at the township aforesaid, in the said river and Queen's common highway there, the said dam unlawfully, &c., did, and still doth continue so erected, fixed, placed and set in the said river and Queen's common highway, as aforesaid, by means whereof the navigation and free passage of, in, through, along and upon the said river and highway, &c., hath been, and is greatly straitened, obstructed and confined, so that, &c., to the common nuisance, &c."

The case was tried before the Chief Justice of Common Pleas, when it appeared that the River Sydenham was formerly called Bear Creek: that it run through the township of Sombra, and was connected with the River St. Clair through what is called the Chanaille Ecarté.

For the prosecution the following witnesses were called:

1st. James H. Burr, who stated that the dam in question was near lot No. 16, 13th concession Sombra, and obstructed the navigation: that the stream was navigable from its mouth up to and above this dam: that a vessel carrying 100 tons could go two and one-half miles above it, and that the country above abounded in valuable timber: that last spring a small steam-boat drawing about three feet four inches tried to pass up and over the dam, but failed, and was injured in the attempt: that she might have gone two and one-half miles higher up: that he had sounded from Robinson's mill at the east half of lot 16, 14th concession higher up, at different times between October previous and the trial, and found depth of nine feet, seven feet, and four feet seven inches, the lowest at a bar.

2nd. Ira Sturdevant stated that he had known the stream for twenty years: that the dam in question was on No. 16, 13th concession Sombra, and had been put up nearly two

years ago by the defendant: that before its erection boats and lumber vessels used to ascend three quarters of a mile higher up and load staves, &c., and that it obstructed the navigation: that the water was six feet deep where the dam was built before it was made, and that it was a considerable navigation: that a vessel took away 2000 staves fourteen years ago, three quarters of a mile above the dam, in July, but he could not tell the description of vessel, whether a scow or what, but that it was called a schooner: that vessels generally load five or six miles below the dam: that they could not get up at low water: that he had known a vessel to come up near to where the dam was before its erection, and take 400 or 500 bushels of wheat: that there were four feet of water at any season from the place where vessels usually stop to the dam, and that in high water vessels could go ten miles above the dam: that in freshets the water would rise to fourteen or fifteen feet, and that spring freshets usually last six weeks, and those in June two or three weeks: that small boats had ascended higher than the dam within fourteen years, not vessels, except as above mentioned: that the next mill higher up is Robinson's, three quarters of a mile above the witness's place, which is between the two, the witness being upon No. 15, 13th concession, and that the navigation was material to Robinson: that the depth of water is affected by the St. Clair: that at the lowest there was two and one-half feet of water on the bar at his place, which is at a bend, and eighteen inches at the lowest, on the line between the 13th and 14th concessions and the defendant's dam, distant about two miles by water: that timber had been delayed above his place for want of water to float it down till the following season: that several persons hold property between the dam and the witness, all of whom used the stream with boats, canoes, &c., and that this prosecution was at their instance. •

3rd. David Tulloch stated that he had been seventeen years up there, and that before the dam it was a navigable water for schooners and vessels to go up and down, and there was a considerable business in lumbering carried

on : that the dam was erected in the fall of 1849, and had obstructed the navigation ever since : that schooners often load below it, it being easier to float the logs down than for vessels to go up : that it was the invariable practice before the dam for vessels to stop below and the timber to be floated down, and that he had never seen a vessel higher than the dam, but had heard there had been : that the last vessel he saw was eight years ago, when one came up close to it, but below where the dam was, to Wilkes' mill, and took in wheat : that the dam prevented logs floating down, but at the time of the trial it was below the level of the water, and leaky, &c. : that if properly made it would obstruct the navigation, but that it had never been finished : that the dead water from the St. Clair backs up a mile above the dam : that vessels could not go up if it be allowed to stand, and that it must obstruct the navigation.

4th. John Robinson stated that he had lived on the North Sydenham since the fall of 1849, and owned a saw mill two and one-half miles by water above the defendant's dam, but far less in a direct line : that he had purchased at the head of the navigation, after careful examination : that the navigation did not depend upon the flow of water down, but upon the back water from the St. Clair, which fluctuated very much : that at its lowest he had the level taken in December 1849, that the shallowest part was half a mile below his mill, where it was three feet deep ; next, at Ira Sturdevant's a few inches more, and so on : that it would be lower in summer than in December : that occasional slides of the bank occur, and that timber and logs, drift-wood &c., grounding, cause jams, obstructions and deposits : that he forbid the defendant building the dam : that at first nothing could get over it, but it had been run down, and there was a partial navigation, but not for vessels : that the low water season continues two or three months, but does not affect the navigation : that the transport of goods by land instead of by water enhances the cost : that the prosecution arose out of proceedings at a public meeting, respecting which various papers were shewn to him, and some of them read by the defendant's counsel.

For the defendant was called—

1st. Joel Westbrooke, who stated that he had lived on the stream above Robinson's for five years, and frequently passed on it in a canoe : that he had measured it in June 1850, and found the depth near the defendant's dam to be two feet three inches ; at Ira Sturdevant's three feet, and so narrow that he could jump over it : that at high water it was practicable up to his house—twelve miles, with a large steam-boat ; but that it falls fast, and that in low water it could not be ascended to Robinson's in a canoe, but might this year, because the waters of the St. Clair have risen : that the winds will cause a rise of water, and that the waters of the St. Clair backed up to the dam : that in July and August, when the water is low, he had to raise a kind of dam to float a loaded canoe over, but that now the defendant always drew his canoe over the dam, and he felt no inconvenience : that the dam improved the navigation above, by raising the water at rapids and bends, so that they can be ascended faster than before : that schooners stop below the defendant's dam, five or six miles by water, at a place called the head of the navigation (Goodins), three miles by land : that the stream is 110 feet wide at that place, and eighty feet or so at the dam : that there is a bar at Goodin's with four and one-half feet of water, but that vessels sometimes go a mile higher up and take in half a load, being warped up : that lumber was always rafted down to Goodin's bridge : that the defendant has a grist-mill, the next being twenty miles off : that the dam did not obstruct timber descending, and had been partly torn down : that by dredging and a lock, the navigation might be improved.

2nd. Philo Salter, a surveyor, who stated that the river runs through lots numbers 15 and 16 in the 13th and 14th concessions ; and also, No. 14 in the 13th concession of Sombra : that the two dams (the defendant's and Robinson's), are three quarters of a mile apart : that in surveying two years ago he had waded across the creek between them—in June, at low water—when the water was from two to three feet deep : that at Robinson's dam rafts of

timber are separated, and single sticks run over : that large vessels stop three or three and a half miles below the defendant's, and none of any size go up higher : that it is called the portage, and where they ship timber : that he had frequently waded the stream below the defendant's dam, at places not over two and one-half feet of water, though at some seasons it was five feet deep : that he did not think the St. Clair would affect the Sydenham so far up as the defendant's dam, unless caused by winds : that the waters in the St. Clair are two feet higher than usual this year.

3rd. Alexander Meyers, a son of the defendant, stated that last summer he went with one McChechney to assist him with a canoe load of flour : that they started from the defendant's dam and found the water low, and had to draw the canoe over some timber that had sunk and dammed up the stream, so that it was a foot deeper above than below it.

It is proper to explain that the defendant was only an agent in charge for Mr. Wilkes of Brantford, who was said to own No. 16, 13th concession Sombra, and for whom the defendant had erected the dam, to raise water for a grist-mill ; also, that a little below this dam another stream joins the North Sydenham, which was likewise dammed, or had been, by Mr. Wilkes, who owned the lands on both sides of these streams.

It was left to the jury to decide whether the stream in question was a navigable water higher up than the defendant's dam, a navigable water being defined to be that which leading to or from the navigable rivers or lakes was accessible with vessels or boats, or both, and capable of being used in the carrying trade up or down : that if navigable with boats, scows, schooners, steam-vessels or such other craft as was generally used in the inland commerce, it would be a public right or easement ; also, that its use downwards, and its capacity to float rafts, &c., entered into the same question : that the shallowness of the water and difficulty of ascent, &c., for vessels, were evidence against the inference : that the public had a right to all navigable waters as public easements, and

that whether navigable or not was to be determined by reference to the craft and commerce of the country and the use that could be made of the stream : that the question was, not whether the dam was a private nuisance to Robinson, but whether the stream was a public highway and the dam a public nuisance.

The jury found the defendant guilty, but judgment was suspended in order that the case might be submitted to this court to determine whether the conviction was legal or not under the various objections made by the defendant's counsel, viz :—

1st. That there was not any evidence that the defendant committed the offence charged at the place alleged.

2nd. That there was not sufficient legal evidence that the place in which, &c., was a navigable river and Queen's common highway, as alleged, or to establish the public right of navigation there, as alleged.

3rd. That the defendant's owning the *locus in quo*, the evidence shewed it to be a small stream which by legislative enactment and the laws and usages of Upper Canada, he might obstruct for the useful purpose of erecting mills, &c. ; and that if in so doing he neglected to comply with the statutes, in the construction of the dam, the remedy was not by indictment like the present.

4th. That the provincial statutes 9 Geo. IV. chap. 4, and 12 Vic. chap. 87, recognize the right to erect dams on streams like the North Sydenham, by owners of lands through which they pass, subject to the provisions therein contained, and which impliedly legalize such works subject thereto, &c.

5th. That the dam was not proved to be an obstruction of any useful public navigation previously existing on the river North Sydenham ; but, on the contrary, that it was proved to have improved such navigation.

Wilkes, counsel for the defendant, supported the foregoing objections in Trinity Term last (9th September 1852), and contended—

1st. That the dam was erected *upon* and not *near* to lot No. 16, 13th concession Sombra, wherefore there was a fatal variance between the description of the place where

&c., and the proof—*Rex v. Ridley*, 1 R. & R. 515; *Regina v. Fisher et al.*, 8 C. & P. 612; *Regina v. Botfield*, 1 Car. & Mar. 151; *Rex v. Uezzell et al.*, 15 Jur. 434; 4 Am. Eng. R. 568, S. C.; 2 Du. C. C. 274.

2nd. That the indictment alleged it to be a navigable stream and public highway, and both must be established because, though it might be navigable, it does not follow that it is a public or Queen's common highway, the gist of the indictment being, whether it is the last, which of course must include the former.

3rd. That the evidence was insufficient to shew that it was a navigable stream at all within the meaning of the indictment: that only one vessel had ever ascended above the dam, and that was a scow, fourteen years ago, and that non-user repels the inference of its being either adapted or subservient to purposes of navigation—strengthened by the fact, that even logs of timber descending were floated down far below it in order to be shipped: that it is only supplied by back-water, and at low water was quite narrow and useless—*The Mayor of Lynn v. Turner*, Cowp. 86: that though navigable, may still be private—*Woolrych on sewers*, 2, 3, 31, 34; *Schultes on aquatic rights*, 134; *Chad v. Tilsed*, 5 Moore 185, 2 B. & B. 404; *Ball v. Herbert*, 3 T. R. 255; *Hale de jure Maris*, 1, 9, 10; *The King v. Smith et al.*, 2 Doug. 444; *The King v. Montague et al.*, 4 B. & C. 602, 6 D. & R. 616: that user, not depth of water, is the test—*Vooght v. Winch*, 2 B. & A. 667.

5th. That *user* only could render it a public highway, or something equivalent to a grant or dedication—1 Haw. P. C. 701, sec. 13, 5 Bac. Ab. "Nuisance," C.: and in this province can only be acquired by grant from the crown or dedication by private owners, which might be inferred from long user, but would be repelled by non-user—*Chad v. Tilsed*, 2 B. & B. 403; *Mills v. Rose et al.*, 5 Taunt. 705, 1 Mar. 313; provincial statutes 59 Geo. III. chap. 18, 2 ses., 2 Geo. IV. chap. 2, 3 Wm. IV. chap. 41, 4 Wm. IV. chap. 36, 6 Wm. IV. chap. 24, 3 Vic. chap. 40, 8 Vic. chap. 66, 13 & 14 Vic. chap. 90, 9 Geo. IV. chap. 4.

He argued that the acts relating to mill-dams with aprons

legalized such dams in eligible situations, so that they could not be abated, nor form the subject of an indictment for a nuisance : that when there is a special remedy by statute, it is oppressive to indict—*The King v. Boyal*, 2 Lord Kenyon 552 : that if a highway, the public incur the *onus* of preserving it, and they would be bound to clear out the channel which is obstructed by drift-wood, shoals, &c., a burthen not assumed nor contended to rest upon them—Provincial statutes 7 Vic. chap. 36, 10. & 11 Vic. chap. 20, provincial statutes of Lower Canada ; *Bush v. Steinam*, 1 B. & P. 407 ; *Rex v. Jones*, 3 Camp. 230 ; *Rex v. Lord Grosvenor et al.*, 2 Star. N. P. C. 511 ; *The King v. Russell et al.*, 6 B. & C. 566 ; *Rex v. Ward*, 4 A. & E. 384 ; *The King v. Tindal et al.*, 6 A. & E. 143 ; *Williams v. Wilcox et al.*, 8 A. & E. 314 ; *Regina v. Randall*, Car. & Mar. 496.

Richards, did not formally appear to support the conviction, nor did he give it up, or abandon it, but seemed rather to wish to leave it with the court, feeling a delicacy in contending for the navigation as a public easement, in consequence of his having been employed to argue against such a construction on behalf of a convicted party in another case much resembling this, and pending before the court of Queen's Bench.

MACAULAY, C. J.—The statute 9 Geo. IV. chap. 4, reciting the expediency of affording facility to persons engaged in the lumber trade in conveying their rafts to market, as well as for the ascent of fish in various streams then obstructed by mill-dams, &c., enacted that every owner or occupier of any mill-dam which was or might be *legally erected*, or where lumber was usually brought down the stream on which such mill-dam was erected, or where salmon or pickerel abounded therein, who should neglect to construct and erect a good and sufficient apron to his or their dam, as thereafter set forth, should for such offence yearly, and for every year, forfeit and pay £25, &c., one moiety to the crown and the other moiety to the person suing, &c. ; and it then described the nature and extent of the apron or inclined plane to be erected.

The statute 12 Vic. chap. 87, passed the 30th of May 1849, referring to the last act, enacted that it should be the duty of each and every owner or occupier of any mill-dam at which an apron or slide *was by the said act required to be constructed*, so to have altered, and if not then built to have constructed, such apron or slide so as to afford depth of water sufficient to admit of the passage over such apron or slide of such saw-logs, lumber and timber as were usually floated down such streams or rivers wherein such dams should be erected: provided that every such owner or occupier of any such dam might construct a waste-gate, or put up brackets and slash-boards in, upon, and across any such apron, for the purpose of preventing any unnecessary waste of water therefrom, and to keep the same closed at all times when no person should be ready and require to pass or float any *craft*, lumber or saw-logs over any such apron or slide, but not until such *craft*, raft, lumber or saw-logs should have gained the main channel of the stream: provided also, that no person should be required to build such aprons or slides on *small streams*, unless required for the purpose of rafting, or floating down lumber and saw-logs, as aforesaid.

Sec. 2. That no apron to any mill-dam on the river Otonabee should be less than thirty-two feet wide by an inclined plane of five feet to a perpendicular of one foot, &c.

Sec. 3 subjected persons not complying with the act to a penalty of 10s. a day, &c.

Sec. 4 provided for exemption until dams carried away or damaged by floods were repaired, so soon as the state of the stream should admit.

Sec. 5. That it should be lawful for all persons to float saw-logs and other timber, rafts and *craft*, down *all streams* in Upper Canada, during the spring, summer, and autumn freshets; and that no person should by felling trees, or placing any other obstruction in or across such stream, prevent the passage thereof: provided always that no person using such stream in manner and for the purposes aforesaid should alter, injure, or destroy any dam or other *useful erection* in or upon the bed of, or across any such

stream, or do any unnecessary damage thereto, or on the banks of such stream: provided there should be a convenient apron, slides, gate, lock or opening in any such dam or other structure made for the passage of all saw-logs and other timber, rafts and *crafts*, authorised to be floated down such stream, as aforesaid.

The statute 3 Wm. IV. chap. 41, expressly authorised a dam in the River Thames, and provided for the construction of a lock for the passage of such boats or other craft as then or thereafter might be in use upon the said river, &c.

The statute 4 Wm. IV. chap. 36, for another dam on the same river, contains a like provision.

The 6th Wm. IV. chap. 24, for another dam on the same river, is to the like effect.

The 3rd Vic. chap. 40, for another on the same river, is to the like effect.

The 4th & 5th Vic. chap. 81, authorises a canal or race-way to conduct the waters of the river aux Perches on lot No. 15; 6th concession township of Sarnia, to the waters on the river St. Clair, in front of lot No. 74, in the front concession of the said township.

The 8th Vic. chap. 66, is to provide more effectually for the construction of aprons to mill-dams on *rivers or streams* in the district of Huron.

The 13th & 14th Vic. chap. 90, for another dam on the River Thames, in Howard, a gore of Camden and Zone, is silent as to a lock, and only requires an apron, &c., and inclined planes, &c., for the safe passage of rafts, and the ascent of fish.

Statute 7 Vic. chap. 36—to prevent obstructions in rivers, and rivulets, or water-courses, by throwing therein slabs, bark, waste stuffs, &c., of saw-mills, &c. (a)

Statute 10 & 11 Vic. chap. 20, re-enacted the last, but it does not extend to any dam, weir or bridge erected in or over any such river, rivulet or water-course, or to anything done *bona fide* in the erection thereof.

(a) See 16 Vic. chap. 151 of last session.

The 14th & 15th Vic. chap. 123, exempts from the application of the two last acts the rivers of St. Lawrence, Ottawa, and any river or rivulet wherein salmon, or pickerel, or black bass, or perch, do not abound.

The 9th Vic. chap. 52 requires slides of certain dimensions to be erected upon the several mill-dams in the river Moira and its tributaries.

The 11th Vic. chap. 10 repeals the last act, and makes further provisions on the same subject.

12th Vic. chap. 79, sec. 2, mentions the river Sydenham, sometimes known as Bear Creek. It enacted that so much of the township of Sombra as lies to the south of the south main branch of the said river should be detached from Sombra and be attached to Chatham.

The 4th & 5th Vic. chap. 26, sec. 15, renders criminal the destruction of mill-dams, &c.

It may be assumed that the estate in the whole township of Sombra being in the crown, it was at no distant period, but when not being shewn, surveyed and laid out in concessions and lots, such concessions and lots being intersected by, or crossing and including, and not bounded by the River Sydenham; and that lot No. 16, 13th concession, which embraced part of the said river, was by letters patent granted to Mr. Wilkes in fee simple; but if so, when, and whether with all woods, ways, waters, &c., expressed not appearing (a).

It was in evidence, that vessels and boats of a certain size might pass, and before the erection of the dam in question had passed, from the River St. Clair into and up the North Sydenham, without obstruction, to a point some distance above such dam, where, however, they were liable to be impeded by drift-wood and deposit, &c.: that at some seasons of the year the water is deeper and the facilities of navigation greater than at others; and that the country is inhabited further up such stream, and through

(a) Upon the trial of an action at the same assizes with this case, in which John A. Wilkes was plaintiff, it was verbally stated that he owned lot No. 16, 13th concession Sombra, and that the Sydenham runs through it. The present defendant was the principal witness for the plaintiff. No patent or title was proved on the trial of this indictment.

the adjacent settlements: that in point of fact, vessels of different kinds had ascended higher up than the dam, using the stream as a navigation for purposes of commerce; also, that it has been long used to float timber and rafts down the stream: that the dam obstructs the river and impedes its navigation. But it did not appear that it had been used to any great extent as a navigation higher up than what is now called the head of the navigation (a place below the dam), although there was proof of its practicability, and of its having been more or less made subservient to the public use as a navigable stream; consequently, the main question is, whether there was evidence to go to the jury sufficient to shew that it was a public navigable water-course or easement; for if so, that it was obstructed to the abridgment of the public right (if it existed) was clear.

It may be material, in the first place, to observe, in reference to the law which pervaded the whole province of Quebec until the division thereof in 1792 that according to the civil law all rivers were distinguished as public or private; such rivers were called public rivers which maintained a perpetual stream, and were capable of being navigated; and an express interdict was made that nothing should be placed in a public stream whereby the navigation might be prejudiced. The civilians held that a stream might acquire the denomination of a river either by its magnitude or by the common acceptance of the neighbourhood. A river was distinguished from a common current occasioned by land floods, because one had always a constant stream regularly confined within banks, and the other might be casual and temporary, flowing over a level. A temporary inundation by floods was not accounted to deserve the appellation of a river, or to alter the original private nature of the soil. Wherever a public stream flowed, though it were through a private channel artificially made, yet it constituted that place public; but, on the other hand, if the stream ceased to flow over it then it became again private—Schultz on Aquatic Rights, 134; 3 Kent's Com. 332-3, 343, 344, 349; *Blundell v. Catterall*

(5 B. & A. 268), *Boissonault v. Oliva* (Stuart's Lower Canada Reports, 565).

In England there seems to be at common law three descriptions of rivers or water-courses.

1st. Navigable rivers—technically so termed.

2nd. Rivers not navigable rivers in law, but so in fact; and though private in relation to the ownership of the soil, yet public highways in relation to the use of the water. Both descriptions are said to be *publici juris*.

3rd. Private rivers—strictly so called.

1st. Navigable rivers are considered as arms of the sea, whether the water be salt or fresh they extend as high as the sea tides flow and re-flow. Schultes on aquatic rights, p. 132, says, every navigable river as high as the sea flows and re-flows is called a royal stream in reference to the public use of it, for these kind of rivers are regarded as public highways by water; and every public river or stream is *alta regia via* (the king's highway)—3 Ass. pl. 6, fo. 32, 19 Ed. 3rd. The River Ley is the king's highway or street—Schultz 132, 3, 4; *Hind v. Mansfield* (Noy 103), *Leigh v. Burley* (Owen 122-3), *The King v. Smith et al.* (Doug. 441). River Barne, Davis 56—"There are two kinds of rivers—navigable and not navigable—that is, a navigable river as high as the sea flows and re-flows in it, and is a royal river (*flumen*), and the fishery thereof is also a royal fishery and belongs to the king by his prerogative. But in these and any other rivers not navigable, and in the fishery of such river the terretenants of each *parte aquæ* are interested of common right.

The reason why the king hath an interest in such navigable river as high as the sea flows and re-flows in it, is because such river participates of the nature of the sea, and is said to be a branch of the sea as far as it flows"—Citing 22 Ass. pl. 93, 8 Ed. II., *Fitz. Corone*, 399.

Formerly navigable rivers were supposed not to extend beyond the salt water flux and reflux of the sea, but that has been long exploded—*The King v. Smith et al.*, *supra*. Nor does the flowing and re-flowing of the sea of itself determine a stream or water to be navigable, though it is

a *prima facie* and cogent evidence thereof—Lord Fitzwalter's case (1 Mod. 105), Warren v. Matthews (6 Mod. 73, Sal. 357), The Mayor of Lynn v. Turner (Cowp. 86), Miles v. Rose et al. (5 Taunt. 706, 1 Mar. 313), The King v. Montague (4 B. & C. 601, 603-4), Mayor of Colchester v. Brooke (7 Q. B. 373), Com. Dig. Tit. "Chimen;" lb. "Navigation"), Pierse v. Lord Fauconberg (1 Burr. 292).

2nd. Rivers that are not navigable, but which nevertheless are public highways by water, are fresh-water streams, or inland rivers above tide waters, that are of capacity to be navigated in fact, and used for purposes of navigation. The soil of public navigable rivers is in the crown, but it consists with the right of property in the soil being in individuals, that the streams or water-courses flowing through the same may be public and common as a navigation or highway by water.

3rd. It is laid down in Hale de Jure Maris 8, 9, published in Mr. Hargrave's law tracts, p. 6—"Though fresh rivers are in point of propriety as before *prima facie* of a private interest, yet, as well fresh rivers as salt, or such as flow and re-flow, may be under these two servitudes, or affected with them—namely, one of prerogative belonging to the king, and another of public interest, or belonging to the people in general—Ibid 8; and another part of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also for smaller, as barges or boats, to reform the obstructions or annoyances that are therein to such common passage; for, as the common highways on the land are for the common land passage, so those kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and, as the highways by land are called *altæ viæ regię*, so these public rivers for public passage are called *fluvii regales* and *haut streames du roi* not in reference to the propriety of the river but to the public use: all things of public safety and convenience being in a special manner under the king's care, supervision and protection—Ibid 9. There be

some streams or rivers that are private not only in propriety or ownership but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers as well fresh as salt, that are of common or public use for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow or re-flow or not, are *prima facie publici juris* common highways for man or goods, or both, from one inland town to another: thus the rivers of Wey, of Severn, of Thames, and divers others as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private property as in what part they are of the king's propriety, are public rivers *juris publici*; and therefore all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment, and removed—Ibid 22. The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers or arms of the sea are affected for public uses—Ibid 36. The *jus privatum* of the owner or proprietor is charged with, and subject to that *jus publicum* which belongs to the king's subjects, as the soil of an highway is, which, though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." See *Blendell v. Catterall* (5 B. & A. 283, 285).

The right of soil in the beds of rivers that are public highways may be acquired by grant or prescription, but nothing can be prescribed for that cannot be granted—Hale de Jure Maris, page 73, ch. 6—*Blundell v. Catterall* (5 B. & A. 285, 309). And although the crown may grant the soil, it cannot grant away or extinguish the public easement—Hale de Jure Maris, 22; *Attorney General v. Burridge et al.* (10 Price 350 to 377, and ib. 378 to 411), *Blundell v. Catterall* (5 B. & A. 209, 302, ib. 304), *The King v. Russell et al.* (6 B. & C. 571), *Williams v. Wileox* (8 A. & E. 314), *F. N. B. 215*, *F. N. B. 226*, without a writ of *ad quod damnum*—Ib. 515; and not then if it

would work a common nuisance—Carter v. Murcott et al. (4 Burr. 2163), Rex v. Lord Grosvenor (2 Star. N. P. C. 511), Blundell v. Catterall (5 B. & A. 299, Ib. 302), The King v. Russell et al. (6 B. & C. 571-8, 6 D. & R. 616, 6 B. & C. 589-9 S. C.), Williams v. Wilcox (8 A. & E. 314), Mayor of Colchester v. Brook (10 Jur. 610, 9 Jur. 1090, S. C.) 16 Vin. Ab. "Nuisance" A., The case of the Isle of Ely (10 Co. 142, 193), The King v. Warde et al. (Cro. Car. 266), Thomas v. Sorrell (Vaughan 341), 2 Inst. 38, Mag. Char. C. 23, The King v. Clarke (12 Mod. 615), Warren v. Matthews (6 Mod. 73, 1 Sal. 357, S. C.), The King v. Hammond (10 Mod. 382), Hale de Portibus Maris 85. Where the soil remains the king's a *purpresture*, (2 Inst. 38, 5 B. & A. 302), an encroachment and intrusion upon the king's soil, which he may either demolish or seize, or arent at his pleasure; and though it were even by building below the low-water mark, it would not be *ipso facto* a common nuisance, unless it be a damage to the port or navigation; but where it is a common nuisance the king himself cannot license it—Hale de Jure Maris, 88; Ib. 8, 9; 4 Burr. 216, note (a).

It appears to me, a writ of *ad quod damnum* will only avail so far as the rights of the crown extend, and only in relation to rights which the crown may grant. (a) A license after such a writ binds the crown, but I do not find that it can authorize the extinguishment of a public easement or right of way by water, unless another, equally convenient, be substituted as a compensation or equivalent to the public—Ex parte Armitage et al. (Ambler 295), Day v. Beddingfield et al. (Noy 105), The King v. Warde et al. (Cro. Car. 266-7), Ford v. Ford (2 Saund. 174-5), Rex v. The inhabitants of Flecknow (1 Burr. 464-5.)

I cannot discern that it is an estoppel upon the public.

Many rivers at present deemed public in England seem to have been rendered navigable by statutes, or by the spontaneous clearing out of the channels by the inhabitants of old. In Ball v. Herbert (3 T. R. 255), it was said by counsel, in argument, that few of the rivers in England

(a) Vaughan 334-5, 1 Leavens 217 841, Cro. Car. 132.

were naturally navigable beside the Thames and Severn, but had been made so under different acts of parliament. In *Blundell v. Catterall* (5 B. & A. 283), Best, J., said, many rivers have been rendered navigable since Bracton wrote, which in his time were private streams, &c.

We find a distinction taken between a river passing through a country, as comprehending the whole body of water and its channel, and the water itself as the ever-fleeting element running through such channels, and of their possible separation in point of proprietorship; the bed of the stream being grantable with the accessorial rights to the flowing water which such grant could confer, while the enjoyment of an easement upon and through such water as subservient to public use, remained common—Bowyer on the civil law, p. 65, 61, 62, 84, 86, 1 Inst. 4 b.; *Chalmer v. Thomas* (1 Yel. 144), *Shury v. Piggott* (3 Bul. 339); and it is of this common right to the use of the running water that we have at present to speak. The right both in relation to navigable rivers, technically speaking, and to rivers that are public highways though not navigable in that sense of the word, seems to be derived from the common law. In *Ball v. Herbert* (3 T. R. 261), Lord Kenyon said, common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country—Com. Dig. "Ley B." 33; and in *Blundell v. Catterall* (5 B. & A. 282), Best, J., said, that as law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters, referring to a passage in Bracton, which he said was good law when Bracton wrote, though not so now, except so far as adapted to the present state of things.—See 5 B. & A. 279, 297, 301.

Whether any stream be navigable and a public highway by water, and, if so, whether an obstruction to such a water-course be a public nuisance or not, are for the jury to decide under the evidence applied to the rules and principles of law applicable to the circumstance of the case.—*Rex v. Lord Grosvenor et al.* (2 Star. N. P. C. 511), *Rex v. Russell* (6 B. & C. 571, 573-4, 587, 602), *Dimes v.*

Petley, (14 Jurist 1133-4), Soltau v. DeHeld, (16 Jurist 326). And the doctrine that it might depend upon the balancing of the advantages against the impediments is exploded; and the test is whether the obstruction was prejudicial to the public to a degree amounting to a nuisance in fact—that is directly, however beneficial collaterally.—The King v. Ward, (4 A. & E. 384), The King v. Tindal (6 A. & E. 143), Regina v. Randall (Car. & Mar. 496).

With a view to the foregoing and future observations, it may be proper to notice several of the cases.

They must be taken in reference to the facts of each respectively, and the language of the judges applied accordingly; otherwise some of them would lead to the creation of doubts, instead of settling rules or principles.

The first I shall mention is Miles v. Rose et al. (5 Taunt. 705 & 1 Mar. 313)—Case for obstructing the plaintiff's barges navigating a navigable river called Rainham Creek, which was proved to be a creek running down from a bridge called Red Bridge, in Essex, to the Thames, and in which the tide flowed and re-flowed as far as the bridge. It was proved that boats and vessels came up the creek, but nearly all of them to load or discharge cargoes at a wharf of the defendant's on the side of the creek below but near Red Bridge; that a few boats, however, had landed their cargoes at Red Bridge, and that boats with parties of pleasure had been known to sail up the creek, and others had come with persons who cut reeds along the banks of the creek. The defendants relied upon the creek having been made navigable by their predecessors and so kept by themselves, claiming it as having purchased the premises, which were conveyed to them by the description of Rainham Wharf and Creek, by which name such premises had been mentioned in several deeds, and their having for many years received from the owners of vessels which frequented their wharf, and from the plaintiff himself, both wharfage and tolls for navigating the creek. The plaintiff contended it was open to all the King's subjects as a navigable river; stress being laid upon the

fact of boats, some for pleasure and some to cut reeds having gone up it without permission of the defendants. It was left to the jury to say whether it was a public navigable creek, or to be considered as the private property of the defendants. The learned judge, LeBlanc, expressing no opinion, but remarking, that as the mention of the premises in the deeds was not a matter of much certainty, the chief question was the manner in which the creek had been used. The jury found for the plaintiff, and the Court of Common Pleas refused to set aside the verdict—Gibbs, C. J., saying, that on the defendants' own shewing the case was extremely doubtful; that the flowing of the tide, though not absolutely inconsistent with a right of private property in the creek, was strong *prima facie* evidence of its being a public navigable river: that the cutting of reeds was a very strong act indeed; and even as to pleasure boats, that if a person wished to preserve an exclusive possession he should keep up the evidence by guarding against intruders. Heath, J., said the defendants might have scoured the channel for their own convenience.

Now, here stress is laid upon the way the creek had been used, not upon the fact whether it was navigable naturally; and, if so, whether being within tide water it was a navigable river and public, though its being within the reach of the tide was regarded as strong *prima facie* evidence. This imports that it was only *prima facie*, not conclusive. If not capable of use in its natural state, and only rendered so by private individuals, is to be taken as material, it may have weight; but if once a public easement existed, whatever was to determine that point, it remains a question what there was in mere non-user to extinguish it, and if it did not otherwise exist, how far the evidence of user was sufficient to establish it. The decision, I suppose, was right and consisted with common law principles; but the court disposed of the case in summary terms, and do not seem to have laid down any clear principle upon which the creek was to be regarded as a public navigation further than the mere fact that the tide flowed up to the bridge.

Vooght v. Winch (2 B. & A. 662).—It was held that in a public navigable river, twenty years' possession of the water at a given level was not conclusive as to the right. The plaintiff's mill and the defendant's wharf were both situated on a stream called Channel Sea River—the defendant's above, the plaintiff's below. Between them was Potter's Ditch, which connected Channel Sea River with Water Works' River, which last was connected with the river Lee. The defendant widened and deepened Potters' Ditch, which diminished the supply of water to the plaintiff's mill. The plaintiff's witnesses represented that Potters' Ditch was not navigable for barges;—one of the defendants stated that barges had passed along it for the last fifty years. Lens, sergeant, before whom the case was tried, directed the jury, that in the case of all streams of water, the use of which furnished beneficial enjoyment to any individual, the material thing to be attended to was what had been the actual possession and enjoyment by such person for the last twenty years, and that such enjoyment for such a period would give the right, and that the rule applied to all streams, whether navigable or not; and it was left to them to decide whether Channel Sea River (qu. Potters' Ditch) was navigable, and in what way, whether as a public navigable river, or for the convenience of the adjoining occupiers—but that whether navigable or not, twenty years bound the parties. The jury found for the plaintiff, but the verdict was set aside for misdirection, on the ground, that if a public navigable river, the direction as to twenty years conferring the right was incorrect. See *Rex v. Cross* (3 Camp. 224), *Rex v. Jones* (Ib. 230). Abbott, C. J., said, if it was a navigable river, his Majesty's subjects had a right to navigate it: an obstruction of twenty years' standing would not prevent them using it as such; that *whether it had ever been navigable* was not found by the jury. Bayley, J., thought there was evidence to go to the jury to say whether it was not navigable; and if it was, that twenty years was not a bar to the public right. Holroyd, J., to the same effect.

Now, here it is not clear whether the question was as to

Channel Sea River or Potters' Ditch being navigable: I think the latter must have been the one; for it was that which had been widened and deepened. There does not seem to have been any question made as to the former.—And as to Potters' Ditch, it seems to have been considered as depending, not so much upon its having been navigable as upon its having been navigated, although it was laid down that if it ever was a public navigable river the public right had not been extinguished by non-user for twenty years. No test by which it was to be determined whether navigable or not is stated beyond the conflicting evidence of whether it had been navigated by barges. The case therefore, enunciating no principle on this point, is little applicable to others involving similar questions. It is to be observed that it leaves untouched the effect of the twenty years that the defendant withheld the flow of water to the plaintiff; and the question arises between the parties strictly in reference to their respective private enjoyment of the water, instead of the defendant's relying upon the public right as he did.

Chad v. Tilsed (2 B. & B. 403, 5 Moore 184).—*Trespass q. cl. f.*—plea a right of entry to fish.—There had been an old grant of the island of Brownsea, with wreck of the sea. At one extremity of the island was a bay of about sixty acres called St. Andrew's Bay, which at low water became an expanse of uncovered mud, intersected by a small inlet or gully, only a few feet wide, called a take or lake, and in which there was three or four feet of water at low tide, and about the same depth over the mud at high tide. About forty years before an embankment had been constructed across the chord of St. Andrew's Bay to reclaim the mud and bring it into cultivation, &c. It was about one-and-a-half miles from Pool, and in full view thereof, and no opposition was ever made. The bank being forced by a storm, the sea re-entered—but the possessor treated it as his own, and no one was permitted to fish or remain in the gully without his consent: repeated assertion of property in this part was proved. The bay formed no part of the harbour of Pool, and vessels of any burthen could not float there. The jury found for the

plaintiff. Dallas, C. J., said, cases of the sort might rest on grant, or usage, which pre-supposed a grant; that long usage might avail in the construction of an ancient grant containing general words, and that from forty years' usage anterior usage might be inferred. He laid great stress upon the long previous and undisturbed usage.—The court treated the flat as shore of the sea, uncovered at low water, in which the plaintiff might claim a right by grant or usage—Hale de Jure Maris, part 1, C. 6, p. 27; and evidently did not regard it as a navigable water and a part of the sea in that sense.

I can see how usage and lapse of time may operate when the subject matter might be acquired by grant, usage, or occupation. It is not so clear how the right to fish, when the shore was covered by the sea, could be extinguished—5 B. & A. 314, Ib. 293-4, Ib. 298.

Blundell v. Catterall (5 B. & A. 299).—That the public have on common law right to bathe in the sea, and, as an incident thereto, of crossing the seashore, &c., for that purpose. The subject of common law rights upon the sea and its shores, and of the modes by which they may be curtailed, or infringed, or countervailing rights be acquired, are in several respects discussed at much length. Many observations of the learned judges tend to shew that the power of the crown to interfere with the rights of the public therein may be exercised to a limited extent, and in relation to some of the privileges through the medium of writs of *ad quod damnum*, &c., not however including the right of navigation.

The King v. Montague (4 B. & C. 598).—The defendant was indicted for cutting a trench across the King's highway &c., being a road or embankment across Yanklet Creek, which runs on the west side of the isle of Grain, and unites the Thames and Medway. The defendant contended the creek was a public navigable stream. It was proved that the road had been raised from time to time during the last twenty years, so that no boats could pass over; but that thirty or forty years preceding light boats drawing little water had occasionally been able to pass over for half an hour before and after high water; and several instances were

spoken of by the witnesses. On removing the embankment the remains of an ancient bridge were discovered, but when or why it was erected, or whether high enough to admit of the navigation, or only made to support the road, did not appear. The learned judge (Graham, B.) assumed that there had been a public navigation through the creek, but said it had probably been obstructed by a natural deposit of silt and mud, and that the bridge might on that account have been suffered to go to decay, and the causeway been made in lieu of it; and then commented on the slight evidence of the use as a navigation. The defendants were found guilty. The verdict was moved against, and the argument turned principally on the question whether there ever had been a public navigation, or whether there was sufficient evidence thereof, and if so, whether it had been correctly left to the jury. A new trial was refused, assuming there once had existed a public navigation. Bayley, J., said it did not necessarily follow because the tide flowed and re-flowed in any particular place that it was therefore a public navigation, though of sufficient size—citing the *Mayor of Lynn v. Turner* (Cowp. 86), *Miles v. Rose et al.* (5 Taunt. 706). If it was a broad and deep channel calculated for the purposes of commerce, it would be natural to conclude that it had been a public navigation; but if it was a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it was difficult to suppose that it ever had been a public navigable channel, thus putting it partly upon its capacity and partly upon its use, but seemingly treating both as material to establish it as a public navigation. And he proceeded to analyze the evidence with a view to that question. He then proceeded to state that, even if once a public navigation, from the manner it had been neglected by the public, and from the length of time during which it had been obstructed, it ought to be presumed that the rights of the public had been lawfully determined, which might have been done by the sea retreating, or the channel silting up so as to be no longer navigable, whereby the rights of the public might

be put an end to, as they had arisen from natural causes, or by act of parliament, or by writ of *ad quod damnum*, or, perhaps by the commissioners of sewers—See *The Queen v. Chorley et al.* (12 Q. B. 515). Holroyd, J., concurred, correcting his opinion in *Vooght v. Winch*, that a public right of this description could only be determined by act of parliament, and expressing his conviction that it might be done by writ of *ad quod damnum*, or by natural causes, citing *F. N. B. 515*—if there be an ancient trench or ditch coming from the sea, by which boats and vessels used to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the king to make a new trench, they ought first to sue a writ of *ad quod damnum* to inquire what damages it will be to the king or others—And see *F. N. B. 225 E.*; the case of the Isle of Ely, (10 Co. 141), *Thomas v. Sorrell* (Vaughan 341), *The King v. Warde et al.* (Cro. Car. 266-7), *The Queen v. Oyden* (7 Mod. 45), *The King v. Butler* (3 Lev. 220), *The King v. Stoughton* (2 Saund. 161, 174).

In these cases, however, there is an equivalent, and one thing substituted for another, equally advantageous; a vested existing public right of way by water is not extinguished by prerogative right under the writ of *ad quod damnum*.

In *Blundell v. Catterall* (5 B. & A. 306), Bayley, J., said, the king, for the public welfare, might suffer such a right to be exercised in those parts of the shore which remained in his hands, to any extent which the convenience of the public might require. Littledale, J., thought the navigation had terminated by natural causes—as, by recess of the sea, or deposit of mud, &c. As to the case of *Rex v. Montague*, see 7 Q. B. 374.

Bower v. Hill et al. (1 Bing. N. S. 549).—The defendants having erected on their own premises a permanent obstruction to a navigable drain through the defendant's premises to the plaintiff's close—held, that an action lay for the plaintiff, although the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud. It did not appear that

it was a public navigation—rather that it was altogether private—and having been obstructed below, though only immediately below, the deposit of mud, it was held to be some obstruction to the plaintiff's right to use the water-course, and therefore actionable.

Williams v. Wilcox et al. (8 A. & E. 314), is an important case. It was trespass for throwing down a weir appurtenant to the plaintiff's fishery, &c., which the defendant justified by plea as being an obstruction to the Severn, a public navigable river. It appeared the weir had not been made since the 3rd Ed. I. It was left to the jury to say whether there had been an immemorial right under a grant from the crown, of obstructing the navigation by the weir, and they found for the plaintiff. Against a rule to set aside such verdict, it was contended the first question was, whether the crown had, before Magna Charta, power to grant the right of erecting a weir for a fishery which might afterwards obstruct the navigation of a river, and whether there could be a legal grant to erect a weir obstructing a part of a navigable river, only partially, and after the grant. Lord Denman, C. J.: "If the subject had by common law a right of passage in the channel of the river paramount to the power of the crown, we cannot conceive such right to have been originally other than a right locally unlimited to pass in all and every part of the channel. The nature of a highway which a navigable river affords, liable to be affected by natural and uncontrollable causes, &c., and attended by the important circumstance that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway, to remove obstructions—namely, to clear away sand-banks, and preserve any accustomed channel—all these considerations made it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks." Again, "If then subject to this right, the crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes

of navigation, it follows from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case the subject has not at this moment the right to use that part of the channel in which the weir stands, it is only because of the royal grant, and that grant must then be alleged at its date to have done away for ever the right of the public in so much of the channel; but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir subject to the necessities of the public, when they should arise; for the right of the public being supposed to be paramount by law, the grantee must be taken to be cognizant of such right, and the same natural peculiarities, and the same absence of any obligation by law on any one to counteract those peculiarities above mentioned, would give him full notice of the probability that at some period his grant would be determined." Having disposed of the subordinate matters, he came to that on which the argument mainly turned—namely, the power of the crown, at common law, to interfere with the channels of public navigable rivers, and in answer to the argument that prior to Magna Charta the power of the crown was absolute over them, he said, "We cannot (after a careful examination of the authorities and statutes referred to) see any satisfactory evidence that the power of the crown in this respect was greater at common law before the passing of Magna Charta than it has been since. It is clear that the channels of public navigable rivers were always highways. Up to the point reached by the flow of the tide the soil was presumably in the crown, and above that point, whether the soil at common law was in the crown or the owners of the adjacent lands, there was at least a jurisdiction in the crown, according to Sir Matthew Hale, "to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater

vessels, but also for smaller barges or boats—*De Jure Maris*, part 1, c. 2, p. 8. In either case the right of the subject to pass up and down was complete. In the case of the Bann Fishery—Davis Rep. 57 (a)—where the reporter, in speaking of rivers within the flux or reflux of the tide, said that this right was by the *king's permission*, for the ease and commodity of the people; but if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must *be coeval with the monarchy*, and *anterior* to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty which the law casts on the crown of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law." But the court held the weir, nevertheless, legal by force of the 4th statute 25 Ed. III. chap. 4, which reciting that the common passage of boats and ships in the great rivers of England, was oftentimes annoyed by levying, or setting of mills, weirs, &c., provided for the utter destruction of all such as had been levied and set up *in the time of Edward the first, and after*, for the reasons he suggests; and that the statute 45 Ed. III. chap. 2, and 1 Hen. IV. chap. 12, did not at all weaken the *defence* (*qu. plaintiff's case*) under the former statute, and the rule *nisi* for setting aside the said verdict was discharged.

The Mayor of Colchester v. Brooke (7 Q. B. 340, 9 Jur 1050 S. C.)—Held that the liberty of passage on a public navigable river was not suspended when the tide was too low for vessels to float, the public right in that respect including all such rights as with relation to the circumstances of each river were necessary for the convenient passage of vessels along the channel; wherefore, a vessel which could not reach her place of destination in a single tide, might remain aground till the tide served; also, that an individual cannot abate a public nuisance if he is not

otherwise injured by it than as one of the public—The Duke of Somerset v. Fogwell (5 B. & C. 875, 884), Gray v. Bond et al. (2 B. & B. 667).

Dimes v. Petley, (14 Ju., 1133-4, 15 Q. B., 276 S. C.)—An obstruction amounting to a nuisance in a navigable river, alleged to have extended below low-water mark, whereas it did not reach low-water mark, but stood below high-water mark—held sufficient, and the misdescription immaterial. It was also said, if there be a nuisance in a public highway, a private individual could not of his own authority abate it, unless it did him a special injury, and that he could only interfere with it as far as was necessary to exercise his right of passing along the highway; and that a plea of justification should allege a necessity for the defendant to navigate his ship over that part of the river where the nuisance was, or that he could not avoid it with reasonable diligence.—See *The King v. Smith et. al.* (4 Esp. 109.)

Soltan v. DeHeld (16 Jurist, 326, 21 L. J., Chan. 153.) *Held*, per Kindersley, V. C., to constitute a public nuisance, the thing complained of must be such as in its nature or its consequences is a nuisance, an injury, or a damage to all persons who come within the sphere of its operation, though it may be in greater or less degrees.

Turning to cases of private water courses, we find it stated in *Williams v. Morland* (2 B. & C. 913.)—per Bayley J.,—that flowing water was originally *publici juris*; that so soon as it was appropriated by an individual his right was co-extensive with the beneficial use to which he appropriated it. Subject to that right all the rest of the water remained *publici juris*; and that the party who obtained a right to the exclusive enjoyment of the water did so in derogation of the *primitive right of the public*.

Mason v. Hill et. al. (3 B. & Ad. 304, 5 B. & Ad. 1 to 26 S. C.); *Wright v. Howard* (1 S. & S. 190.)—That to confer a right to an appropriation of water, twenty years' undisturbed enjoyment was necessary. In *Wright v. Howard* the Vice-Chancellor said there is no property in the water; and in *Williams v. Morland*, Holroyd J. said running

water is not in its nature private property, at least not longer than it remained on the soil of the person claiming it.

In *Mason v. Hill* cases were cited *Cox v. Matthews* (1 Vent. 237), *Bealey v. Shaw* (6 East. 208), *Saunders v. Newman* (1 B. & A. 258), *William v. Morland* (2 B. & C. 913), *Canham v. Fisk* (2 Tyr. 155, 2 C. & J. 126,) 2 Bl. Com. 14-18), to shew that the right to running water was acquired by appropriation or occupancy. This doctrine was controverted in *Mason v. Hill* by Lord Tenterden in 3 B. & Ad. 304, and Denman, C. J., in 5 B. & Ad. 1, who also qualified the doctrine that the right to flowing water was *publici juris*. Both of which propositions he however acquiesced in *sub modo*, as therein explained. He cited the dictum of Bayley, J., above mentioned, and of Tindal, C. J., in *Liggins v. Inge* (7 Bing. 692,) that it was well settled by the laws of England that water flowing in a stream was *publici juris* &c., (2 Bl. Com. 14-18.) He then referred to the civil law respecting (among other things) public rivers, whether navigable or not, once public as distinguished from private rivers, and then said, the dicta of the learned judges above referred to, in which water was said to be *publici juris*, were not to be understood in any other sense than this, that all might drink it or apply it to the necessary purposes of supporting life; and that no one had any property in the river itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession and during the time of such possession only; and that there was no authority in our law that the first occupant had any right, by diverting the stream, to deprive the owners of the land below of the special benefit and advantage of the natural flow of water therein until presumption of a grant had arisen.

Wood and another v. Waud et. al. (3 Ex. R. 748, 13 Jur. 472.)—*Pollock, C. B.*, (p. 774) said, the principles which regulate the law as to natural streams (a) were fully con-

(a) 1 Saund. 114 a, note (g)

sidered and placed on their right footing in *Mason v. Hill &c.*; that flowing water, as well as light and air, were in one sense *publici juris*; they were a boon from Providence to all, and differed only in the mode of enjoyment. Again, the property in the water itself was not in the proprietor of the land through which it passed, but only the use of it. He then cites authorities, American and English, shewing the right to natural streams to arise *ex jure naturæ* and not by acquiescence &c.

Embrey & another v. Owen (15 Jurist 633, 20 L. J. Ex. 212.)—Parke B., said, that the law as to flowing water was put upon its right footing by a series of cases beginning with *Wright and Howard* (1 S. & S. 190) followed by *Mason and Hill* (3 B. & Ad. 304, 5 B. & Ad. 1,) and ending with *Wood v. Waud* (3 Ex. R. 748,) and added that flowing water was *publici juris*, not in the sense that it was *bonum vacans*, but that all might reasonably use it who had a right of access to it &c. See *Wright et. al. v. Williams et. al.* (1 T. & G. 398,) *Canham v. Fisk* (2 Tyr. 156,) 2 Stephens' Commentaries, 12-13.

Dickson & another v. the Grand Junction Railway Company (16 Jurist 200.)—Parke B., said, "We consider it as settled law that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*."

Unity of possession will not destroy a water-course—*Woolrych*, law of waters 235; *Woolrych*, law of ways 70.

Shury v. Piggott (3 Bul. 339.)—Per Whitlock J., "there is a difference between a way, a common, and a water course; *Bracton*, lib. 4, fol. 221-222 calls them *servitutes prædiales*; those which begin by private right, by prescription, by assent, as a way, common, being a particular benefit to take part of the profits of the land; this is extinct by unity, because the greater benefit shall drown the less. A water-course doth not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted."

Challener v. Thomas (Yel. 143.)—Ejectment does not lie for a water-course—1 Inst. 4, b.

The cases shew that to acquire a right of way or other easement adversely, twenty years' uninterrupted enjoyment as of right is necessary, though it may be conferred by dedication of the owner in a much less period of time.—

Daniel v. North (11 East. 375, and *ib.* note,) Rex v. Lloyd (1 Camp. 260,) Rex v. Barr (4 Camp. 16,) Woodyer v. Hadden (5 Taunt. 126 to 143,) Wood v. Veal (5 B. & A. 454,) Jarvis v. Dean (3 Bing. 447,) The Trustees of the British Museum v. Finnis (5 C. & P. 460, and note,) provincial statute 10 & 11 Vic. ch. 5, secs. 2, 5, 8, Marquis of Stafford v. Coyney (7 B. & C. 257,) 12 Vic. ch. 35, sec. 41, Barracleugh v. Johnson *et. al.* (8 A. & E. 99,) Poole v. Huskinson (11 M. & W. 827,) McQueen v. the Inhabitants of East Mark (11 Q. B. 877,) Grand Surrey Canal v. Hall (1 M. & G. 391,) Kinloch *et. al.* v. Neville (6 M. & W. 795) Roberts v. Hunt (15 Q. B. 17.)

There are also a series of cases which decide that an acquired easement (as a right of way) may be lost by non-user, or acquiescence in an adverse user, if such acquiescence evince a design to abandon though for a less period than twenty years—such as Liggins v. Igne (7 Bing. 682 693,) Moore v. Rawson (3 B. & C. 332,) The King v. Montague (4 B. & C. 602,) Lawrence v. Obee (3 Camp. 514.) Regina v. Chorley (12 Q. B. 515), 2 Stephens' Comm. 41-42. And this doctrine seems under some circumstances applicable to the loss of easements by the public as well as private individuals, when the non-user indicates or affords evidence of a general intention to abandon it; or perhaps, more correctly, non-user constitutes evidence from whence it may be inferred that the right never in fact existed.

Hillary v. Waller (12 Vez. 265.)—Lord Chancellor (Erskine): "The presumption in courts of law, from length of time, stands upon a clear principle built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him. It has application in all cases of incorporeal hereditaments and when there is a written title. As to incorporeal hereditaments: 1st. Rights of

way, not enjoyed for a number of years, though a convenience, if not a necessity, for the enjoyment has existed, the court directs the jury to presume, either that it never did exist or that it was surrendered, &c. I have heard it stated this does not apply to a *public road*. It applies more to that than to a private road. The reason given was that there cannot be the same presumption of a surrender. If by matter of record the right appears vested in the public, it may be so, as there the right appears and the surrender does not appear. But if it does not rest upon matter of record, *and the public have not enjoyed*, it is to be left to the jury to presume, and is almost conclusive, not that it was surrendered, *but that it never existed*; for this special reason, one may surrender, or for many reasons may not enjoy his right; but the probability is as to the public, that some instance of enjoyment would be shewn. That is much stronger than the case of a private road, if for many years there has been no enjoyment; for what one man may relinquish another may be disposed to assert." See Vooght v. Winch (2 B. & A. 667,) Abbot C. J., at the bottom of the page; the King v. Montague (4 B. & C. 602,) Bayley J., at the bottom of the page; Rex v. Allan et. al. (2 O. S. 105,) Weld v. Hornby (7 East. 199,) Chad v. Tilsed (2 B. & B. 403.)

If we turn to this side of the Atlantic, we find high judicial authorities upon the same subject. Mr. Angell, in his treatise on water-courses, refers to several decisions in the several courts in the United States—p. 16. Adams v. Pease and another, 2 Con. Rep. 481—Swift, C. J., "Rivers are considered navigable so far as the sea flows or reflows &c. Above the ebbing and flow of the tide the public have a right or easement in such rivers, as common highways, for passing and repassing, with vessels, boats or any water craft." Hosmer, J.—"The case is reduced to the question whether the river Connecticut is a navigable river where the tide does not ebb and flow. If the term navigable is construed according to its popular import, every river capable of being sailed upon by a boat, however small or shallow, is embraced by it. Many of the inconsiderable streams

which fall into the Connecticut are of this description. The same common law, however, which has established the principle has furnished a definite explication of the disputed term. Every river where the sea ebbs and flows is by the common law considered navigable ; that the distinction between rivers navigable and not navigable—i. e., where the sea does or does not ebb and flow—is very ancient (Doug. 441); the former are called arms of the sea—the latter, private or inland rivers. Again : All rivers above the flow of the tide in reference to the use of them are public, and of consequence subservient to the public accommodation ;” hence, he adds “the fisheries, ferries, bridges, and the internal navigation are subject to the regulation of Government.”

Carson v. Blazer et al., Penn., 2 Binney’s Rep. 475—Tilghman, C. J. did not consider the common law principle concerning rivers applicable to such rivers as the Susquehanna, Ohio, Delaware, Schuylkill, &c. The first runs a mile wide and is several hundred miles through a rich country, and is navigable and actually navigated by large boats, and with which the streams in England are comparatively small. Yeatis, J. adopted similar views. Brackenridge, J. after discussing the general law and local acts authorising persons owning lands adjoining navigable streams declared highways (certain rivers excepted) to erect dams under restrictions in favor of the public, &c., said these principles did not apply to surveys which include streams where the soil covered with water makes part of the grant.

It is to be observed that both the foregoing were cases respecting rights of fishery.

Hooker v. Cummings, (20 Johnson, 90), also a question of right of fishery in Salmon river—Spencer, C. J., taking notice that it was a fresh-water river, and that no tide flowed and reflowed from Lake Ontario, went into the general question very fully—upholding the common law doctrine as to navigable rivers, he said it also considered other rivers, in which the tide did not ebb and flow, as navigable. Again : That he concurred in the doctrine that all rivers in fact navigable, whether above the flow of the tide or whether in its

whole extent unaffected by tides in reference to the use of them, as public and subservient to public accommodation, and liable to government regulation.

Palmer et al. v. Mulligan et al. (3 Cains, 307)—case for a private nuisance to the plaintiffs' mill and dam at Stillwater, on the river Hudson.—Spencer, J. said he could not but consider the Hudson as a common highway—that, independent of its being navigable with small craft and rafts above the place in dispute, the Legislature had constantly so considered it. Thompson, J. said, that being above tide water, the land under the water might be made the subject of private grant; subject however to be used by the public for the purposes of boating, rafting &c., so far as should be necessary for public use and accommodation—referring to Harg. Law Tracts 8, 9. Kent, C. J. quotes the dictum of Hale de Jure Maris, Harg. Tracts, p. 5, 8, 9, and approves thereof as the true and just rule, and as harmonizing private right with the public interest. He said, the Hudson at Stillwater was to be deemed a public highway for public uses, such as rafting lumber, to which purpose it had been and was still subservient; to obstruct which and other public uses of the river by dams, &c., would be a nuisance, &c.

The People v. Platt et al. (17 Johnson 195)—Indictment for a nuisance in obstructing the passage for fish in the Saranac, a river running into Lake Champlain.—Spencer, C. J. quoted Hale de Jure Maris, p. 8 and 9., (ante) and after referring to several of the English authorities, said, the distinguishing test between those rivers which were entirely private property and those which were private property subject to the public use and enjoyment, consisted in the fact whether they were *susceptible* or not of use as a common passage for the public—citing Kent, C. J., in Palmer v. Mulligan, as adopting a like distinction. It was a conceded fact in the case that the Saranac was not navigable for boats of any kind, though since 1810 rafts had occasionally been brought down. He mentioned, in reference to the grant to Platt, that there was no reservation of the use by the public of the river, either for passage or fishing, but that the power of regulating and controlling the use of the Saranac

so as to subserve the public interests would have been impliedly reserved had that river been navigable. After denying the power of the Legislature constitutionally to interfere with this river, he said, of others it might be that they were navigable for boats, and then no objection could lie to such acts.

Wadsworth v. Smith (2 Fairf. 278.)—It is said that rivers which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right, and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right; that such rivers, therefore, cannot lawfully be so obstructed, even by the owners of the banks and bed as to interfere with this public right. That if, therefore, the Ten-Mile Brook (the stream in question) was naturally of a sufficient size to float boats or mill logs, the public have a right to its free use for that purpose, unencumbered with dams, sluices or tolls. Again: but such little streams or rivers as are not floatable—that is, cannot in their natural state be used for the carriage of boats, rafts or other property—are wholly and absolutely not private, subject to the servitude of the public interest, nor to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public.

The extracts from the last case are taken from *Allen's New Brunswick Reports*, 1 vol., p. 329, 330, and 333—*Rowe v. Titus*, which is a very important case in itself. It was a case for obstructing a navigable river called Hammond River, whereby saw logs of the plaintiff were prevented descending. The defendant was proprietor on both sides of the river, and ten years before had built a saw mill and dam extending across the river, which at that place was about 200 feet wide; he had also placed a boom above the dam. In November, 1845, plaintiff was what is called driving a large number of saw logs down this river on their way to St. Johns. The defendant's boom being closed, a large quantity were stopped there, and when it was opened, the logs passed over the dam on a mass and jammed below—the water fell, and the plaintiff could not get the logs to

market. It appeared that before the defendant's dam was built, the river had been used for driving down logs and timber, and persons had occasionally passed up and down in canoes, but it was not generally used for boating except by persons occupied in lumbering. It was a rapid stream, easily affected by rains—rising and falling quickly; and being somewhat obstructed by rocks and shoals, was rather a difficult stream to drive. From the building of the dam until two years before the trial, all the logs brought down the river had been sawed at the defendant's mills and his works caused manifest obstruction. It was left to the jury to decide—1st, whether the river had been *used* in such a way as to bring it within the definition of a public highway; and 2nd., if so, whether the obstruction injured the navigation generally: that every stream upon which logs and timber could be driven was not therefore a highway, but such as could be used for the passing and repassing of boats and canoes for the accommodation of travellers, at ordinary seasons of the year, &c. The jury found for the defendants, stating that it was not a navigable river. A rule nisi was obtained for a new trial. In the course of the argument the case of *Esson v. McMaster* (1 Kerr. 501) was referred to as having decided that all rivers, though above the flowing of the tide, which afforded a common passage not only for large vessels but for boats or barges, were by the principles of the common law public and common highways, &c. The case was twice argued. Chipman, C. J. after the second argument, gave the judgment of the court, making the rule absolute. He quoted the language of the court in *Wadsworth v. Smith*, and said it was fully borne out by the doctrine laid down in *Hale de Jure Maris*, and that if such was a true statement of the law it was not correct to confine the description of rivers, which were water highways, to such as would bear boats or barges for the accommodation of travellers; but that it extended to all rivers which might be used for the transportation of property; and that Lord Hale considered "all rivers" to be *prima facie publici juris* except "little streams" which did not afford a common passage for the use of the

King's people. He went on to say that Hammond was a river of very considerable extent both in length and magnitude, and had been *used* for many years before the erection of the defendant's works for floating down timber: that the mere capacity of a stream during spring freshets or after heavy rains to float down single sticks of timber or logs, was of itself a very uncertain criterion of the public or private nature of the river—for no stream was so small but that it might at times suffice to be used for driving down a log or piece of timber; and therefore that the breadth of a stream, its length and depth, and volume of water at ordinary times, and its capacity for the conveyance of rafts, were matters proper to be taken into consideration: that it was difficult to lay down any general rule applicable to all cases, but the court thought that taking all the evidence together, in regard to the river in question, it partook of the character of a river subject to the public right of way, rather than that of a mere private river. Mr. Justice Carter was present at the first argument, but not at the second, and we have not therefore the benefit of that learned judge's opinion, but he concurred in the judgment of the court in *Esson v. McMaster*.

Esson v. McMaster (1 Kerr. New B. 501, 1842).—Case for obstructing a river called Barnaby's river, a tributary of the Miramichi, by erecting a dam across it and a pier and boom, whereby the saw logs of the plaintiff descending the stream were hindered and delayed, &c. It appeared in evidence that it had been customary to float logs and timber down the river from above these obstructions, which were above the ordinary flow of the tide, and which were above the navigation for loaded boats, and that in the summer time the place was quite dry, but in ordinary cases canoes were used upon it. Chipman, C. J. in delivering the judgment of the court, said that the stream was a public highway, and the defendant liable to the plaintiff for the private injury sustained by him, &c., and went largely into the question as to what rivers were deemed in the law public highways, and cited several passages from Hale's treatise *de Jure Maris*, published in Hargraves' Law tracts, p. 6, 8, 9, 22, 36, which he considered the standard authority on this branch of

law, and as clearly shewing that all rivers, though above the flowing of the tide; and whether the property of the river was in the crown or in a subject, which afforded a common passage, not only for large vessels but for boats or barges, were by the principles of the common law public and common highways, and were subject in the same manner as highways on the land to the use of all the Queen's subjects for passage and transport of property thereon : that Barnaby's river was a branch of the S. W. Miramichi, and extended twenty-eight miles into the interior ; there was considerable settlement on its banks, and it was customary to use it for floating down timber and for navigation by boats and canoes at all seasons of the year, and that it was therefore of common right and a public highway according to the doctrine of Lord Hale. The report does not show at what particular part of the twenty-eight miles the obstructions had been made ; nor, except in general terms, that it had been long used, as above stated—from what period, or how largely or generally, it had been navigated. Botsford, J. said, it is not for the reason that a river is a navigable river (i. e., as defined by Lord Hale) when the tide flows and reflows, that the public have a right of way. There is the same public right to rivers that are navigable for rafts and boats where the tide does not flow and reflow, and this right is founded on public convenience. The principle of public convenience was peculiarly applicable to a new country, where from the want of roads a water communication is indispensable for the transport of supplies for the settlers, and the passage of timber and other cumbrous articles to market. Parkes, J.—referring to Lord Hale's classification of rivers into three sorts: 1st. public; 2nd. private, but subject to public rights; 3rd. private altogether—said, the difficulty was in distinguishing by the rules he had laid down and the examples he gave, the class to which several of the small streams flowing into the great rivers of the province were to be assigned, and said there is not only a great difference in the character of small rivers in England and those of New Brunswick, but also in the mode of navigation and use by boats, barges and the like, on the one,

and by canoes and floating down logs and sticks of timber, &c., on the other : that there was scarcely a stream in the province, however inconsiderable, upon which canoes and timber might not float at some seasons of the year, and was thus to a certain extent useful to the public. Again, after referring to *Rex v. Russell* (6 B. & C. 566), and the *King v. Pease* (4 B. & Ad. 30) (a), respecting the preponderance of public benefit, &c., and of the applicability of such a principle to mill-dams erected under grants from the Crown as to some extent serving the purposes of locks and aiding the navigation, and referring to *Juscon v. Thornhill*, (Cro. Car. 132) went on to say, if the principle of that case were extended so as to include dams erected under the grants of the Crown, the effect of which, though not the object, was to improve the navigation in general though creating a partial hindrance, little injury need be apprehended from the decision then pronounced. But he thought that when the occasion arose it might be well to consider the different circumstances of a new country and an old—observing upon the importance of saw mills at the mouths of such streams as Barnaby's river as far outweighing any partial inconvenience from the obstruction, and upon the fact of the settlers upon the upper parts of the river having come there under Crown grants, with full knowledge of the obstruction; though he at the same time was fully aware of the utility of rivers as a means of communication with the interior in the infancy of a country—considerations, however, that might be thought more fit for the Legislature than the court; and that in the United States, though they had adopted Lord Hale's treatise in laying down the common law on the subject, most of their rivers were under statutory regulations. Another point in this case was the plaintiff's right to recover without proof of special or substantial damage not material to be here noticed.

There is also the case of *Boissonnault v. Oliva* (Stuart's Lower Canada Rep'ts, 565, in the Queen's Bench, Montreal), in which the subject was a good deal discussed; and it is

(a) See the *King v. Ward* (4 A. & E. 884.)

applicable to the present case ; but as the system of jurisprudence in Lower Canada differs from ours at the present day, I do not state the circumstances. The language of Read, C.J., however, bears strongly upon the point in question ; and I may remark in reference to the old law of Canada, which formerly was in force here, that its tendency was (if anything) stronger than the common law of England in favour of permanent streams of adequate capacity being *publici juris*.

It is not perhaps safe to attempt extracting any general rule from the foregoing authorities, however desirable ; but the conclusion to which I am led is, that in England the right of the public to the use of all rivers naturally adapted to purposes of navigation, whether salt or fresh, or whether below or above tide waters, originates in, and is derived from, the common law as being *ex jure naturæ*, and are *publici juris* ; and that the rule applied to navigable rivers regarded as branches of the sea has been extended in development of the same common law to other (inland) streams capable of like subserviency and upon like principles—Hale de Jure, *ante*. Such rule (if a sound one) can be applied extensively as a test, and narrows the inquiry in the first instance to the consideration, whether any specific stream was in fact navigable in its natural state, or rendered so by public improvement, or by public authority for public use, but subject nevertheless to subordinate questions that may at times arise touching the effect or prerogative right, crown or private grants, or of presumptive acquisition by dedication or user,—so also of non-user, abandonment or extinguishment by natural or other causes.

If the rule is to be taken as laid down by Woolrych on waters, p. 31—namely, that waters flowing inland where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of Legislative enactments, are public rivers, and consequently that the test is immemorial usage or act of Parliament^(a) ; the former (usage) could not be applied to any of the inland waters in Upper Canada

(a) 3 T. R. 255, 2 B. & B. 406.

unless presumed in relation to the wandering tribes who may have roamed through this part of North America before its discovery by European navigators; and under the latter (act of Parliament) the consideration would be whether the common law, having by a provincial statute superseded the former law of Canada, must not be taken *proprio vigore* to have rendered all navigable waters existing at the time of its introduction *publici juris*, and more especially if previously entitled to be so regarded under the abrogated law; and this I am disposed to think the correct view to be taken in relation to Upper Canada.

I agree that user is the foundation of the rule so far as the rules of the common law in relation to navigable waters, as in many other respects (Com. Dig. "Ley" B., Doc. & Stu. Diag. 1, chap. 4, at the end; 1 Bl. Com. 67, 68; 1 Stephens' Com. 45, 46), are exclusively derived therefrom, and not from the civil law or other sources, and as respects rights locally acquired merely by long enjoyment.

And I can also perceive how in England user may be necessarily resorted to at all times in determining whether any specific water-course was navigable, and if so, whether the public had acquired or retained an easement therein; for the original or natural state of such stream, or the times when, and means by which it became navigable, may have been lost in remote antiquity. In a country settled and peopled time immemorial, I can see how the fact of ancient or long usage may affect these questions as it will here in future ages; but I do not feel that a like test can be at present applied to a newly discovered country like this, which has been first occupied long within the period of legal memory, and much of it within living memory, but to which the common law has been *uno flatu* applied. It appears to me that long and general usage has established as a common law principle that rivers naturally navigable in fact are *prima facie publici juris*; the principle being established, becomes applicable to all streams that fall within it in capacity, volume of water &c., whether anciently or recently discovered or reduced to servitude; and that in the application of the common law to Upper Canada

positive usage immemorially, or from which prior usage immemorially might be inferred, cannot be necessary to render a naturally navigable water-course *publici juris* (a), but that when our inland streams are proved to be in fact, and in their natural state, navigable, they are *prima facie*, or as I understand the civilians would express it, in *presumptio juris tantum*, public highways by water.—(Best on Evidence, 40, §. 43, ib. 329, S. 288.) In this light user or non-user is only material (in reference to the period and progress of settlement and contemporaneous enjoyment by, or exclusive of the riparian proprietors and others) as auxiliary evidence contributory to the inquiry whether a stream was or was not navigable from the beginning; but it does not therefore follow that it is the only medium, or an indispensable circumstance in the proof.

I find water treated as a transient element, not capable of specific grant or proprietorship, except as temporarily or partially monopolized in the exercise of the lawful right thereto.

I find the original right to running water, in both a public and private point of view, *jure nature*, and not accruing from occupation and as a consequence that such right is *publici juris* wherever the stream is capable of general and common use as a highway by water.

I do not find this right limited to tide-waters, or to great inland fresh water rivers, but extending from such great rivers to others of smaller dimensions to an extent not with certainty defined, and therefore creating questions of increasing nicety and difficulty in proportion to the diminution of the stream. Nor do I find, what I feel authorized in adopting as undoubted law, that whenever the capacity of a stream or the public right to its enjoyment becomes questionable, the question whether it is public or not is to be solved by reference to *use* alone; although I can perceive how in such cases usage may materially assist the investigation, especially if the adjacent country had been long settled and inhabited, and therefore the opportunity to

(a) *Chad v. Tilsed*, 2 B. & B. 406.

enjoy or to forego enjoyment—in other words, the opportunity to create such evidence—had been thus afforded to neighbouring population.

To make it depend upon usage implies that, however navigable in fact, a public easement does not arise *prima facie*, but is to be acquired by enjoyment, and if so, the question must become one of time and user combined to a sufficient degree to create and confirm the right. But this is not what I understand to be laid down in *Hale de Jure Maris* and approved in subsequent authorities; wherefore I prefer the conclusion, that in the application of the common law to Upper Canada in substitution for the old law of Canada, it should depend upon the fact of natural *capacity*, and not the fact of usage.

It must of course be determined by a court and jury in each case as it arises, whether a water-course ever was or continued to be a public highway or a navigable stream in the full and comprehensive meaning of the term, and therefore a public easement. The questions of *law* for the court being, what constitutes a public or navigable river, and whether there was sufficient evidence thereof, or to repel it; the questions of *fact* for the jury being, whether according to the data laid down by the court and the evidence it was in fact so navigable.

Such inquiries are liable to be influenced by the effects of natural and other legitimate causes in extinguishing an admitted public right, or in shewing that no such right ever existed; and it is to be remarked that distinctions may well exist between the diversion or decay of streams in the course of nature, or of the settlement and clearing up of the country, or by obstructions from rocks, shoals, landslips and other impediments of a permanent nature, on the one hand; and casual accidents from fallen trees, drift-wood &c., or artificial or temporary obstructions, on the other.

In the application of the ever-varying facts and circumstances of different cases, it must be, as observed by Mr. Baron Parke in *Embry v. Owen* (*supra*), a question of degree and very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use

of a stream from its wrongful application, but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not. Such remarks are alike applicable to the *use* of public or private streams, and between the public and individuals, or between riparian owners and others—and not only as to the use, but as respects the primary question, whether the stream be navigable and public, or strictly private.

In my view of the subject, it is proper to distinguish between the general right and its casual exercise, and not to confound the mere *act* of use with the *thing* to be used. It is the adaptation of a stream to purposes of navigation, and not the being adopted in use, that renders it a navigable river; and usage, after all, seems to me but evidence to prove the fact of capacity in relation to the thing as affording the easement claimed therein. I do not find it any where laid down that at common law any river or stream confessedly navigable in its natural state might so continue and yet be purely private to the exclusion of the public and the extinction of the common right of enjoyment.

Canada, being formerly a French territory, became vested in the crown of England by conquest and cession not a century ago; after which it was for a time governed by the civil laws of Canada as received from France (Imp. stat. 14 Geo. III. chap. 83, sec. 8,) and the criminal law of England (same statute, sec. 11). When the province of Quebec was divided, the law of England was by act of the local Legislature substituted in Upper Canada for the old law of Canada in language similar to that used in the above statute, that is, "in all matters of controversy relative to property and civil rights:" (prov. statute, 32 Geo. III. chap. 1, sec. 3.)

Until the year 1792, therefore, the law of Canada as introduced from France operated here; and the case of *Boissonaut v. Oliva* (Stuart's L. C. Reports, page 565) is applicable in reference to that period.

Before the common law of England was substituted, Upper Canada had been partially opened to settlement and grant. It was afterwards gradually and more extensively subdivided and organized into counties, towns and town-

ships. The great lakes and some rivers may be said to be common to the whole province, and others to several counties, towns and townships ; while of minor streams, some have been made the boundaries between townships, and others have been included in the townships, concessions and lots through which they pass, and so far treated as private streams. The principal of these waters (including the river St. Clair) have always been regarded as navigable rivers and public highways, upon the principles of the original law of Canada and of the common law of England.

The Bear Creek or River Sydenham, is a tributary to the St. Clair and the North Branch at the place in which &c., intersects and runs through the Lot No. 16, 13 concession Sombra, and that lot may have been granted by the Crown to Mr. Wilkes ; but the patent, if any exists, was not given in evidence, and I believe it is usual of late years to except or reserve navigable waters in such grants, and the grant of this lot cannot be of long standing.

Of small rivers like this, included in or covered by royal grants, it may be said they never were navigable or *publici juris*, and that unless a right thereto as a public easement was acquired by user, like a right of way or passage across, over and along the dry land embraced in the same patent, no such right could be inferred or established. On the other hand, it might be answered that, although the soil was granted the waters could only be so *sub modo* ; for that if susceptible of public use as a navigation, the public right must have preceded the grant, and could not be thereby extinguished, but being paramount must prevail, and exclude the presumption of any intended infringement thereupon by the Sovereign in making such grant. According to what was said by Lord Stowell in the case of the *Elsabee*. (5 Rob. Ad. Reports, 182,) namely, that "in conjunction with it must be taken the wise policy of our law, which interprets the grants of the Crown in certain respects by other rules than those which are applied to the construction of grants by individuals. Against an individual it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the

public in which person an interest remains—whether in the grantor or the taker. With respect to the grant of the Sovereign it is far otherwise. It is not held by the Sovereign himself as private property, and no alienation shall be presumed except that which is clearly and indisputably expressed.”

When the territory now forming Upper Canada was devoted to settlement, the use of all streams practicable for navigation (if not already the common right of all His Majesty's subjects throughout the Empire as a national interest) may be justly considered as dedicated to the public use upon the principles of—first, the civil, and afterwards the common law, so that although not pre-occupied by public use, they are to be looked upon as open to the public^(a).

And so far as the King's permission, for the ease and commodity of the people may be material, it may be said in reference to the language of Lord Denman in *Williams v. Wilcox* (ante), that the permission must be coeval with the introduction of such laws; in other words, that upon their introduction they immediately operated upon and conferred in common with air and light the public and private rights which they acknowledged, and among others, that all navigable waters were *publici juris*. If it be said that at those periods many streams, including the present, only meandered through the wilderness remote from the habitations of man, and that the whole territory, both land and water, was a royal domain at the disposal of the Crown; the answer seems to be that, if concurrently with private occupation and settlement of the soil under Crown locations and grants, the riparian and other proprietors, and those carrying on intercourse with them, made the streams subservient to navigation, they would be reduced to servitude accordingly at the same time that the adjacent lands became reduced to occupation and use, and that if not *publici juris a priori*, the right would accrue *pari passu* and unimpaired.

I do not (though perhaps I might) lay stress in relation to user, upon the probability of all our internal streams having

(a) *Regina v. The Inhabitants of East Mark, Tithing*, 12 Ju. 332, 11 Q.B. 377.

been more or less frequented and used by the aborigines to whom both the woods and waters were alike common, or by the old French hunters in their transient pursuits; but it is proper to remark that, independent of the wandering Indian tribes, a navigation in prosecution of the fur trade existed from an early day through Canada and thence into the North-Western regions along the lakes and rivers of the country, interrupted by occasional rapids, rocks, shoals or other natural obstructions, causing what are called "*portages*," but resumed as the streams admitted,—which streams, though not navigable continuously, are nevertheless throughout those portions not thus impeded undoubtedly highways. The Ottawa River illustrates this. It could not well be contended that all the waters thus actually used are not navigable waters and *publici juris* by actual enjoyment, and of these the river St. Clair is one. Then from the St. Clair small vessels and boats of various sizes may without interruption proceed into and up the North Sydenham to a point beyond the *locus in quo*. If, as said by some of the witnesses, the back waters of the St. Clair affect the level of the Sydenham to a point higher up than the dam, it only strengthens the argument that it is a navigable water and open to public use.

Highways exist by land and water. In Upper Canada those by land have accrued to the public by dedication of the Crown—*Regina v. The Inhabitants of East Mark, Tithing*, (12 Jur. 332, 11 Q. B. 877)—in what is commonly termed allowances for roads in the original survey of towns and townships, or by dedication of private individuals, or under the provisions of the statute law, or by usurpation and long enjoyment. Upon land, therefore, highways are established only by some positive act indicating the object and its accomplishment. They are, it may be said, artificially made, or only become such by acts in *pais*. It is otherwise with navigable rivers and water-courses. They are natural highways, pre-existing and coeval with the first occupancy of the soil, and formed practically the first or original highways in point of actual use. It is well known tradition in relation to portions of the province long settled,

and the common occurrence in other parts more recently occupied, that the only, or at any rate the most convenient, access was by water.

Then, was the Sydendam in its natural state, and at the place where the dam is erected, navigable in fact? and if so, was it navigated? The former relates to its *capacity* to be made subservient to public use as a navigation; the latter, to its having been *actually made* so subservient.

If the only consideration material on this occasion is the first proposition, the jury have found in the affirmative—the evidence warranted such finding; and of the capacity of the stream, both in depth and width, I think there can be no reasonable doubt.

But it is said the lot of land through which this part of the stream flows has been granted to Mr. Wilkes, whose servant, in erecting and maintaining the dam, the defendant was. If however there existed concurrently with the interest acquired by Mr. Wilkes as grantee of the estate in fee a public easement or right of way upon the waters running through the lot, such right (even if not saved or reserved by the patent) could not be extinguished by force of the royal grant to the public detriment; and therefore, if not expressly, it would be considered as impliedly excepted from its operation.

If, in the absence of a previously acquired right by actual enjoyment and usage, there existed only an inchoate privilege to reduce that part of the river to servitude as a public navigation which might be anticipated and precluded from becoming matured by a grant from the Crown not specially saving or reserving it, user would of course become material. How far the Sydenham had been thus made subservient up to and beyond the point in question, there was not much, although there was some evidence. When granted (if granted) did not appear, for no grant was shewn. Were it even doubtful, but only doubtful, whether it is *publici juris*, either by reason of its capacity or user, or both combined, or exclusively private by reason of the supposed grant, I apprehend the understood rule is, that the private and more recent pretensions must be regarded as subordi-

nate, and yield to the prior and paramount claim of the public, which must prevail.

In my opinion, however, it is no longer doubtful if it be made clearly to appear that the stream in its natural state was in fact navigable before and at the time of the grant, whether reserved therein or not. If it was reserved, there is of course no question on the subject; if its navigability in fact be established—as I think it was by sufficient evidence, as the jury have declared by their verdict—that it was not reserved cannot be intended; it is rather to be presumed that it was excepted in the absence of the Crown patent, if its issue or existence is to be assumed.

I do not think the provincial statutes referred to evince that in the opinion of the Legislature such streams as the Sydenham, or all streams passing through granted lands, are private rivers or water-courses. Some of these acts are adapted to waters strictly private, and speak of dams *legally* made; which they could not be in obstruction of public highways by water; and others are intended expressly to authorise dams in streams manifestly regarded as public navigations, but in which the public interests are protected, if not promoted, by requiring the construction of locks, to be freely used exempt from tolls. They are not in terms like the statutes mentioned by Lord Denman, C. J. in *Williams v. Wilcox* (ante); nor was this dam built in conformity with the provisions of those statutes.

This investigation has convinced me of the importance of Legislative declaration as to what streams, and to what extent streams shall be deemed public and navigable waters. It is done to a great degree, I believe, in some of the other British colonies and in several of the United States of America, and seems called for here, in order to define public and private rights in relation thereto, and to prevent controversies and litigation.

All this however does not dispose of the case, though it does of the main question. There remains the objection of variance.

Variance—

Rex v. Ridley, (1 R. & R. 515)—That an indictment

under 57 Geo. III. ch. 90, for entering a close or enclosed ground in the parish of W. with intent to destroy game &c., must in some way particularize the place.—By five judges to three.

Regina v. Fisher et al. (8 C. & P. 612).—Indictment for obstructing a highway by placing a gate across it—stated the way to be *from* the town of C. *to* a place called H., and charged the obstruction to be *between* the town of C. & H. The *locus in quo* proved to be within the limits of C. *Held* bad, as the terms *from* and *between* excluded the town. Per Pattison, J.

Regina v. Botfield (Car. & Mar. 151).—Indictment for a nuisance by obstructing a highway leading *from* the township of D. *into* the town of C. by placing a gate across it. *Held*, that the termini D. & C. were excluded, and if it appeared the gate was put up in the township of D., the defendant was entitled to be acquitted.

Rex v. The Inhabitants of Gamlingay (3 T. R. 513).—Indictment for not repairing a road leading *from* A. towards and unto B. is exclusive of B.

2 Roll. Ab. Indictment M. pl. 19.—Indictment for stopping a way at D. leading *from* D. to S. quashed, because it was alleged to be *from* D., which excluded it.

Halsey's case (Latch 183), *Rex v. Nele* (3 Keb. 89); (ib. 644).

Pugh et ux. v. Duke of Leeds (Cowp. 714).—In relation to *time*, “*from*” may be construed inclusive or exclusive.

Hammond v. Brewer (1 Burr. 376).—*From* the town of B. excludes it.

Rex v. The Inhabitants of Harrow (4 Burr. 2091).—*From* R. to S. excludes both.

Rex v. Stevens & Agnew (5 East. 244).—Every indictment ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistencies or repugnancy, and the word “*until*” may be inclusive or exclusive.

Rex v. Inhabitants of Upton on Severn (6 C. & P. 133). “*From and through*” exclude the *town*. Per Tindal, C. J., *The Mersey and Irwell Navigation Compny v. Douglas*

et al. (2 East 500).—Case for obstructing the navigation of the Irwell by a weir described to be “at *the Hulbrook*,” but in fact at a lower part of the same water called “*the tame water*,” held a fatal variance. But held that the allegation that the plaintiffs—to wit, at *Preston*—were entitled to the free navigation of a river *then* called the Irwell, and that defendants, at *Preston aforesaid*, erected a dam in, over and across the said river and continued the same *so there* erected &c., was not matter of *local description* but *venue*—the gravamen not requiring to be laid with local certainty; but if a specific judgment, as to abate the nuisance, was to be given, *semble*, it would be necessary.

As to robberies *near* highways, 2 Ea st. P. C. 785; Archbold’s Cr. Law, 97, 98; *Reu v. Cranage* (1 Sal. 385); 2 Star Ev. 1571.

Drewry v. Twiss et al. (4 T. R. 558).—Case for running down the plaintiff’s boat *near* the half-way reach. Proved to have been *in* the half-way reach—held sufficient.

Hamer v. Raymond et al. (5 Taunt. 789), 2 Hawk P. C. (Curwood) 614, sec. 171, 172; *The King v. Hammond* (1 Strang. 14, 10 Mod. 382), *Regina v. The Inhabitants of Waverton* (16 Jur. 16, 21 L. J. (M. C. 7), 8 Am. Eng. Rep. 344, S. C.).

That this objection is fatal is, I think, proved by this consideration, that *near* lot No. 16 may be *below* it, and that it may be the first lot granted in ascending the river, while all below it is left undisposed of for the very purpose of affording undisputed public access by water to that point in the navigation; and the consequence is, that upon the indictment as framed the defendant is apparently deprived of the right to justify the erection of a dam *upon* the lot as being private estate, and the river within the limits of that lot purely private, however it may be public and common immediately below it. And although not decisive in my view of the case, still it is a material point in it, and one which the defendant is entitled to have accurately stated upon the record. It is not laid merely by way of venue, nor, like some of the above cases, an immaterial allegation not requiring to be proved, but matter of local des-

cription, and the gravamen being laid with local certainty required to be proved as laid, even though a more general description might have sufficed.

McLEAN, J.—On the evidence, which seems fully to warrant the finding, the jury found the defendant guilty, but judgment has been suspended with a view to submit to this court certain points which were raised upon the trial as to the legality of the conviction.

These points were argued by Mr. *Wilkes* for the defendant, in Trinity term last, and the case being one of considerable importance, not only to the party directly interested, but to the public at large, the judgment has been deferred, to afford time for ample consideration.

The learned Chief Justice and my brother Sullivan have favoured me with the perusal of the elaborate and very able judgments which they have drawn up (a), and I feel that I should utterly fail if I were to attempt to add any to the arguments on which their judgments are founded.

Without therefore attempting to find in English cases any distinct authorities to guide us in the decision of questions relating to streams at the distance of some thousand miles from the influence of the tides, I have no hesitation in stating it as my opinion that the great lakes and the streams which are in fact navigable, and which empty into them in these provinces, must be regarded as vested in the crown in trust for the public uses for which nature intended them—that the crown, as the guardian of public rights, is entitled to prosecute and to cause the removal of any obstacles which obstruct the exercise of public right, and cannot by force of its prerogative curtail or grant that which it is bound to protect and preserve for public use.

In this case the river in question is shewn to be affected by the waters of the St. Clair, into which it empties; and it is also shewn that it is navigable at some seasons much

(a) The judgment of the late Mr. Justice Sullivan cannot be found at present. Since his lordship's decease diligent search has been made for it among his papers—but without success. The search will be renewed, and if at any time hereafter it can be discovered, the reporter will publish it separately in these reports.

higher up than defendant's mill dam, and at all seasons some miles above it. It comes, therefore, clearly under the designation in that particular part of a navigable river; and being so, it is, not only by the principles of the common law but upon principles to be gathered from the various acts of our own Legislature, passed to facilitate and to ensure to the public the use of streams of much smaller dimensions, a common and public highway which no individual has a right to obstruct.

It does not appear by the evidence whether the land over which the North Sydenham flows has or has not been granted by the crown, though it seems to have been understood that it had been granted. It would have been satisfactory to see the patent, as its production might possibly have put an end to all question as to the navigation of the river—by shewing an express reservation of it to the public at large. Admitting however, that it does not contain any such reservation, I am clearly of opinion that the want of such reservation cannot affect the public right to the use of a navigable stream.

The indictment alleges the nuisance to be *near* a certain lot, and the evidence shews it to be *on* it. The offence charged is therefore different from that *proved*, and on that ground I am of opinion that no judgment should be pronounced against the defendant in this case.

SULLIVAN, J. concurred.

Per Cur.—Judgment for defendant.

JAMES COLEMAN V. HENRY SHERWOOD.

Replication de injuria.

Assumpsit on a promissory note by indorsee against maker.

1st plea—That the note was given subject to the result of a suit in chancery then and still pending; and that it was agreed that the said note should be deposited with Messrs. Connor, Morrison & Macdonald, subject to the result of such suit, &c., and that the said C., M. & McD. should not in any way use, discount, part with, or sue upon said note, except by order of some court of competent authority; or by consent of the defendant. The plea then averred that no order had yet been made in the chancery suit: that there had not been any consent of the defendant to sue upon the note: that the right of the parties to the chancery suit still remained undetermined; and that the suit in chancery was still pending.

2nd plea—That it was agreed in writing by the plaintiff and the defendant, that in consideration the defendant would give the note the plaintiff would refrain from using same, &c., until the suit in chancery was settled and determined, and that the same was undetermined.

Replication—*de injuria* to both pleas collectively.

Held, on demurrer, that the replication was good.

ASSUMPSIT.—Writ issued 11th November 1852. Declaration, 24th November 1852.

First count stated that the defendant on the 5th of February 1851, made his promissory note in writing, and thereby promised to pay to the order of John Crawford £50, with interest, eighteen months after date; and that the said John Crawford then indorsed the same to the plaintiff, and the defendant thereupon became liable to pay the amount of the said note and interest to the plaintiff, according to the tenor and effect thereof; and thereupon, in consideration of the premises, promised to pay the said sum of money and interest to the plaintiff: yet he hath not paid, &c.

Plea "That at the time of making the said note an action, in which the plaintiff was plaintiff, and among others the defendant was a defendant, was, and still is pending in the Court of Chancery for Upper Canada, in which certain matters were in dispute concerning a schooner called the "James Coleman;" and for the purpose of selling the said schooner, it was agreed by and between the parties to the said action, by an agreement in writing, signed and executed by the plaintiff and the defendant, as well as by all the said parties, that the said schooner should be sold to Samuel Sherwood for £1350, payable

with interest, in equal half yearly instalments, over a period of three years, to be secured by the said Samuel Sherwood's promissory notes, with the indorsement of John Elmsley, and by a mortgage on certain real estate of the said Samuel Sherwood; and that the defendant was to have of these notes to the amount of £400 or £500, to be handed to the defendant on the defendant giving in lieu thereof corresponding notes of the defendant indorsed by John Crawford, of which the note in the declaration is one; the said sale, &c., to be without prejudice to the said suit in chancery, or any of the issues therein raised, or in case the same should be raised in any other suit at law or in equity; or generally, without prejudice to any claim or question of, by, or between the said parties to the said suit, &c., subject in any case to the right of appeal, &c.; and that the said note in the declaration mentioned should be deposited with Messrs. Morrison, Connor & Macdonald, solicitors for the plaintiff, subject to the result of the said suit in chancery, or any other suit that might be instituted to determine the rights of the several parties to the said schooner; and that the said solicitors should not in any way use, discount, or part with, or sue upon the said notes, except by the order of some court of competent authority, or by the consent of the defendant; but that the same should remain in the custody of the said solicitors, without any proceedings being taken or commenced for the recovery thereof, whatever; and the defendant saith that there has not yet been any order whatever of any court made, nor any consent whatever by the defendant that the said notes, or either of them, should in any way be used, discounted, parted with, or sued upon; and that the rights of the several parties interested in the said schooner still are and remain wholly undetermined; and that the said suit in chancery is still pending and undetermined; and this he is ready to verify," &c.

And for a further plea in this behalf the defendant saith, "that at the time the promissory note in the declaration was made and given, it was by a certain agreement in writing then made between the plaintiff and the defendant respec-

tively agreed and promised, that in consideration that the defendant would give the said note, he, the plaintiff, would wholly refrain from using or discounting the same in any way, or bringing any action whatsoever thereupon, or in respect thereof, or the money secured thereby, until a certain action in the Court of Chancery of Upper Canada, in which the above plaintiff was plaintiff and the defendant with certain others was defendant, was or should be finally settled and determined; and the defendant saith that the said action is not yet finally settled or determined; and that the plaintiff hath no right, therefore, to bring this action for the recovery of the said notes against the said defendant; and this the defendant is ready to verify," &c.

Replication.—“The plaintiff, as to the pleas by the defendant firstly and secondly above pleaded, saith, that the defendant of his own wrong, and without *the several causes, or any, or either of them in the said first and second pleas mentioned*, broke his said promises in the declaration mentioned, in manner and form as the plaintiff hath in his declaration alleged; and this the plaintiff prays may be enquired by the country,” &c.

Demurrer.—“And the defendant says that the replication of the plaintiff to the first and second pleas of him, the defendant, is insufficient in law, and states, and shews to the court here the following causes of demurrer to the same:—That the same should not be replied collectively, as it is, but should have been replied separately to each plea; nor does it in effect deny separately the justification pleaded in each plea: and also, because the replication *de injuria* is improper to the pleas as pleaded, the same being in discharge, or wholly denying there ever was any cause of action, and not in excuse; and attempts to raise an issue upon matters of law and not facts: and because the said replication tenders a negative issue, or attempts to throw the proof of a negative allegation in the pleas upon the defendant, instead of raising or tendering an affirmative issue thereon: and also, because the replication puts in issue matters of record or matters proveable only by record: and because the pleas are not such as the

general replication of *de injuria* can properly be replied to ; and because the replication is double and multifarious, and attempts to put in issue separate and distinct issues, and is otherwise uncertain, informal and insufficient."

Joinder in demurrer.

Phillpotts, for the demurrer, contended that the replication throws negative proof on the defendant, instead of raising an affirmative issue : that it does not merely deny the agreement alleged, but puts in issue, moreover, the pendency of the suit, the authority of a court of competent jurisdiction to sue, and the question of assent involving matters of fact and of record, or *quasi* of record, and too comprehensive : that the plaintiff should either deny the agreement alone, or admitting it, shew how, consistently therewith, the plaintiff was entitled to sue.

2nd. That matters of fact to be proved by the records or proceedings in the Court of Chancery should be specially put in issue, and not involved in one general traverse of the whole plea, including first the agreement, and then, if that be proved, facts arising out of it.

3rd. That the plea is in *denial*, not in excuse, and therefore the replication is inadmissible.

4th. That the facts pleaded shew the note not to have been finally indorsed or delivered, but rather deposited in the nature of an escrow ; and the event whereupon they were to become final is not shewn to have occurred.

Macdonald, in reply, treated all grounds of demurrer abandoned, except three, as to which he contended—

1st. As to negative averments, that by the new rules the defendant was bound to plead specially ; that all the facts stated together make but one chain of defence, all of which are verified—i. e., offered to be proved by the defendant—and all put in issue by the replication *de injuria* : that it can be no hardship for the defendant to be put to prove his plea, as he offered to do—*Easton v. Pratchett*, 4 Tyr. 472.

2nd. That no matter of record is stated, nor anything to be tried by the record ; and that every fact is *in pais* to be tried by a jury—proceedings in chancery not being records or of record.

3rd. That the plea is in *excuse*, not denial; that it does admit a *prima facie* making and indorsing, and only sets up collateral contemporaneous matter in excuse of performance of the promise to pay: that it is in the nature of a defeasance, and does not otherwise than argumentatively deny a vested cause of action, nor deny at all the facts alleged in the declaration—*Muttlebury v. Hornby*, 5 U. C. R. 568.

Phillpotts, in reply, again contended that if the agreement shewed the notes in the plaintiff's hands with a collateral agreement concurrently made, it would be in excuse, but that it shews the property in the notes never to have been in the plaintiff, even *sub modo*, as subject to the agreement; that the plea argumentatively denies that the plaintiff is the indorsee or holder as indorsee, but is not demurred to as argumentative; that the plaintiffs never had a vested interest in the notes—*Schild v. Kilpin*, 8 M. & W. 673; *McCuniffe v. Allan et al.*, 5 U. C. R. 571.

That in the matter of it the plea is not in excuse but in denial, and does not admit or confess in the plaintiff a *prima facie* right, or one that could have matured to a right of action except through the medium of the agreement—*Pelly v. Rose*, 12 M. & W. 435.

That no contract was impliedly admitted even *prima facie*, and so, not a plea in excuse.

That the alternatives under which by the agreement the notes ought to become the plaintiff's—i. e., the ending of the suit and adjudication of the rights of the parties, or an order of court, or the assent of the defendant—raise several issues in addition to the existence of the agreement itself: that the plaintiff should have singled out one fact and not endeavoured to put several in issue, depending, as they do, one upon the previous establishment of the other—viz., 1st, The agreement; and, 2nd, The pendency of the chancery suit, a decree upon the right, an order of court, or the defendant's assent, &c., therein mentioned, quite immaterial if there was no such agreement.

That the plaintiff cannot be forced to prove, first, the agreement, then pendency of the chancery suit, and then negatively the want of a decision, or of an order of court, or of the defendant's consent.

That the plea in effect denies any absolute interest or title in the plaintiff to the notes, and does not merely excuse payment—2 Saund. 295.

MACAULAY, C. J.—It is clearly settled that the replication *de injuria* traverses or puts in issue all the material allegations of the plea, and only such as are material—Eyre v. Scovell (5 C. B. 703).

The material allegations in the first plea are—

1st. The agreement in writing therein stated.

2nd. The pendency of the suit in chancery concerning the schooner "James Coleman," if not shewn by the agreement itself.

3rd. That the rights of the several parties interested in the said schooner remained undetermined, or were not determined if not to be presumed till the contrary is shewn.

4th. Negatively that no order of any court has been made, nor any consent given by the defendant, that the said notes should be in any way used, discounted, parted with or sued upon.

At a trial after issue joined upon such a replication, the *onus probandi* would be upon the plaintiff to prove the agreement as alleged. If proved, that would shew on the face of it the pendency of the suit in chancery at the time of such agreement, whence, until the contrary was shewn, its continued pendency, and also that the rights of the parties interested in the vessel remained undetermined must be presumed. If not, then the defendant might be required to give affirmative proof of the pendency of such suit; and if pending, no other proof could be required that the rights of the parties remained undecided.

So it could not be necessary for the defendant to give negative proof that no order of any court had been made, nor any assent of the defendant given; no such order or consent could be presumed without proof contrary to the defendant's allegation; and whether the plaintiff could prove either affirmatively in reply, is not at present the question. But if the defendant proved affirmatively the agreement and pendency of the suit in chancery, the

plaintiff might (probably) prove in reply, as displacing one of the causes alleged for not paying the note, that an order of court had been made as to the note, or that the defendant had assented to its being delivered finally to the plaintiff, or (rebutting the proof of pendency as to the rights of the parties, &c.,) that such rights had been decided, so that *quoad* such rights the suit was no longer pending.

Then arises the consideration, whether the first plea is in denial or in excuse. It appears to me clearly in excuse—*Basan v. Arnold* (6 M. & W. 559).

The plaintiff alleges the making of the note by the defendant, and the indorsement thereof by Crawford to the plaintiff. These allegations are not denied. We must therefore assume that the note is complete in itself made by the defendant, and specially indorsed in full by Crawford to the plaintiff. The plea is in confession and avoidance, and gives sufficient color. It admits that the plaintiff is ostensibly indorsee of Crawford, but alleges his interest as such to be inchoate, and depending upon contingent events not yet occurred. It admits him to be indorsee *prima facie*, but only so *sub modo*, and excuses payment when the note became due, by reason of a collateral excuse.

It is not alleged that it was in fact only indorsed in blank, or otherwise indorsed than as the plaintiff alleges (a); nor is it alleged that it was ever deposited with the plaintiff's solicitors under the agreement; or if it was, it may have been so deposited by the plaintiff after receiving it from Crawford, for the agreement does not say by whom it was to be so deposited; and, consistently with all that is stated, the defendant may have signed and delivered the note to Crawford, and Crawford may have indorsed it in full, and delivered it directly to the plaintiff. The plea distinctly admits the *making* of the note, and says nothing explicitly in denial of the indorsement to the plaintiff, or of his being the ostensible holder. And

(a) *Noel v. Richards*, 5 Tyr. 682; *Smith v. McClure*, 5 East. 476.

the agreement set out in the plea required the defendant's note to be indorsed by Crawford, without saying to whom, except impliedly that the plaintiff was to be indorsee, as it was (of course after being indorsed) to be deposited with the solicitors; or it may be that in the absence of anything more specific the intendment would be that it was to be indorsed in blank. It is, however, averred in the declaration that it was indorsed to the plaintiff, and whether his solicitors ever had it in deposit does not appear in the plea.

It is contended that the legal effect of the matter pleaded is to deny (argumentatively) any vested right of action upon the note in the plaintiff, but that does not prove it not to be a plea in excuse. It is said by Maule, J., in *Catterall v. Catterall* (8 C. B. 114-5), that the replication *de injuria* is only applicable to a plea which shews that the plaintiff never at any time had a cause of action against the defendant, and that is the very object of the present plea. In 2 Saund. 295, note (d), it is said the replication is not good if it amounts to a denial either direct or argumentative of the contract or the breach of it. Now, here the contract is a promise to pay Crawford or his indorsee, which indorsee the plaintiff is admitted to be; therefore the contract is to pay him at the time the note becomes due, according to its tenor and effect. The time for payment had elapsed before action brought, the contract was broken, and the breach is sought to be excused by the special circumstances stated in the plea, and the facts are to be looked to with reference to the time the note was made, indorsed and became due, as well as the time of action and plea pleaded. The declaration imports a transfer by indorsement before the note became due; and if so, was it not competent to the holder to present it to the maker at maturity, in order to hold the indorser liable if not then paid; and if so, who, as holder could present it? If it be admitted for a moment that no such agreement existed as that stated in the plea, no excuse would remain for not paying the note according to the tenor and effect thereof. It seems to fall within *Muttlebury v. Hornby* (5 U. C. R. 568).

As to the replication traversing matter of record jointly with matter of fact, though to be tried separately, it is not so. All is matter in *pais*. The Court of Chancery is not a court of record; no matter of record is alleged, and Crogate's case (8 Co. 67) states, that upon a justification by force of any proceeding in the admiralty court, hundred, or county court, or any other which is not a court of record, there *de injuria sua propria* generally is good, for all is matter of fact, and all makes one cause—See Walley v. M'Connell (13 Q. B. 903).

The only remaining consideration that seems to me important is, whether the replication is bad as being a traverse too comprehensive and multifarious, and in putting in issue allegations both affirmative and negative—whether it should have denied the agreement in terms, or, admitting it, shewn a right to sue under, or consistently therewith. If the agreement, being traversed, was disproved, it would certainly leave the defendant without any defence under the plea, and the replication certainly puts it in issue. It may be asked as a test, whether the replication imposes any further proof upon the defendant; and, without advertising to what the plaintiff might prove in reply, I should think not. If the agreement were proved, the plea would be *prima facie* sustained in evidence. What the plaintiff could shew by evidence in reply, is not perhaps material to be now considered.

Against the admission of proof that the suit in chancery was determined, or that the rights of the parties in the vessel had been decided, or that the defendant assented, or an order in court had been granted, it might be urged that any such matter should have been specially replied in a replication in confession and avoidance, admitting the agreement. If so, that would shew the present replication good; if not, then the objection to it is, that it involves distinct matters not connected in one proposition within the rule on that head—namely, 1st, the agreement; and, if proved, then (as if affirmed and denied, and therefore put in issue) the pendency of the suit, the decision of the rights of all parties—the defendant's assent, or an order of court, &c.—

Crogate's case (8 Co. 67), 1 Saund. 244 c. (7); 2 Saund. 295 (1); Kime on de injuria, 86-7; Fentason 51, 68 Tyr. Pleading 608; Bardons v. Selby, (3 B. & Ad. 2, 3 Tyr. 431, 9 Bing. 756, S. C. in error), Griffin v. Yates (2 N. S. 579), Isaac v. Farrar (1 M. & W. 65), Gibbons v. Mottram (6 M. & G. 692), Reynolds v. Blackburn (7 A. & E. 161).

The strongest way to present the objection is to suppose the plea answered in detail. In that event the plaintiff would have averred—1. That the alleged suit in chancery had not been instituted, and was not pending &c. : 2. That no such agreement as that stated was made: 3. That the rights of the parties were determined: 4. That an order of court had been made: or, 5. That the defendant had assented—which would be double and repugnant, as first denying the suit in chancery and the agreement, and then alleging that the one was not pending, and that the event on which the plaintiff's right was to depend, under the other, had happened.—See 5 Bing. N. S. 579, 4 Dowl. 674.

2. In contrast with such a form of replication it might be stated that the defendant broke his promise without the cause alleged—that is, without this, that the alleged suit in chancery was instituted and pending; that the agreement alleged was made; that the rights of the parties had not been determined; that no order of the court had been made; and that the defendant had not assented; without specifying which allegation, forming a material link in the chain constituting one cause of defence, the plaintiff intended to controvert or disprove.

Now all the allegations pleaded amount to a single point or cause of defence—that the plaintiff is not entitled to sue, or that the defendant has not broken his promise to pay the indorsee or holder. And when that is the case, the decisions are clear that all may be traversed or put in issue by the replication *de injuria*, if the plea be matter of excuse, and not within any of the exceptions in Crogate's case, and that even the objection of multifariousness, which prevailed there, would be no longer sustained.—Robinson v. Raley (1 Bur. 319), O'Brien v. Saxon (2 B. & C. 908); Selby v. Bardons (3 B. & Ad. 1, 3 Tyr. 331).

If the plaintiff was bound to traverse a portion only of the plea a denial of the agreement alone would (if proved) have admitted the pendency of the chancery suit—the want of a decision upon the rights in controversy—the want of an order of court—and the absence of consent: so a denial of the suit, or its pendency, or the decree upon the right, or an order of court, or of an assent by the defendant, would admit the agreement as pleaded. (a) So the question is, whether the plaintiff can be thus restricted in his replication by the stringent rules of pleading.

The gist of the plea certainly is, whether the plaintiff so agreed, and, if so, whether the rights of the parties had been adjudicated upon and decided in chancery;—11 Q. B. 407; 3 B. & Ad. 9; 7 A. & E. 161-3.

I find no case in which the replication of *de injuria* has been objected to either because the plea contained allegations both affirmative and negative—all of which would thereby be put in issue; or because the replication being negative the traverse of negatives in the plea could not raise any issue between the parties. On the contrary, I find many instances of pleas containing both descriptions of allegation held correctly replied to by *de injuria*—the question always being whether the plea was in excuse or within the exceptions in Crogate's case, or the replication too comprehensive a traverse; and it seems (as already observed) to form rather a question of evidence at *Nisi Prius*—that is, whether in this case, if the defendant proved the agreement and *prima facie* the pendency of the chancery suit, the plaintiff could then, in reply, shew by affirmative evidence that the suit was ended, or that the rights had been determined, or an order of court made, or assent given. The test then would seem to be, whether the new matter was not in denial, but in confession and avoidance of the plea. In *Eyre v. Scovell* (5 C. B. 711) Maule, J., said it was a negative replication, and put in issue everything material alleged in the plea, whether the plea was demurrable or not. Sergeant Manning had suggested

(a) 2 M. & W. 648; 9 M. & W. 804; 2 Q. B. 117; 4 Q. B. 816; 4 M. & G. 295, 829; 7 M. & G. 518; 11 Ju. 780.

(*arguendo*) that it was not competent to the plaintiff under such a replication to prove affirmative matter. "It is true (the learned judge said) there is some affirmative matter that cannot be shewn under such a replication. But the true test is this, the plaintiff can only shew matters, whether negative or affirmative, which negative that which is alleged by the defendant in his plea, the distinction being between matters in confession and avoidance of the plea and matters that are in negation of the plea." (a) The application seems to be, that in the case before us, though affirmative proof of a determination of the right &c., would be in confession of the agreement, it would *pro tanto* be in denial or rebuttal of the plea, and not matter in confession and avoidance of the plea as a whole, and constituting one cause of defence and evading the effect thereof by new affirmative matter; but it would be displacing one of the propositions combining to make such plea amount *prima facie* to a defence.

It is a nice and doubtful point, and there is much fluctuation in the forms of traverse adopted in the cases reported; but, considering the expansion which the use of the replication *de injuria* has received by numerous judicial decisions since the new rules, I think it more consistent with the scope and spirit of those decisions to hold the replication admissible than to overrule it as multifarious.

Multifariousness seems to be very much exploded as an objection to such replications, if the plea is in excuse and is single and good:—(see 1 Smith's Leading Cases—notes to Crogate's case, where multifariousness is omitted as an objection to such replication); and if double, the defendant is told that he cannot except to the replication, which is only rendered multifarious through his own bad plea.

Whether (if objected to) the plaintiff could, at *Nisi Prius*, prove affirmatively that the negative allegations in the plea were not true, would still remain a question notwithstanding this decision, if issue could be taken upon it. It is however, now, too late for that.

I am disposed to think it might be done; but it is a question attended with much difficulty, and I do not consider

(a) *Elkin v. Janson*, 18 M. & W. 656, 404; *Brown v. Philpot*, 2 Moo. & Rob. 286; *Bailey v. Bidwell*, 18 M. & W. 73.

it necessary to express any positive opinion upon the point. The result seems to be that if not admissible in reply, the replication is good ; and that, if admissible, it is equally so, inasmuch as though several distinct facts are alleged, all are material (as a joint proposition) to combine in the defendant's favor to constitute a defence ; and that any one of these being displaced would destroy the defence, as pleaded : see *Thimbleby v. Barron* (3 M. & W. 210)—as to agreements not to sue ; also see *Salter v. Purchell* (1 Q. B. 209-218), *Laforest v. Wall* (9 Q. B. 599-602), *Robinson v. Little* (13 Jurist, 149), *Webb v. Spicer* (13 Q. B. 886-895), *Ford v. Beech* (11 Q. B. 852, 12 Jur. 310 S. C.), *Gibbons v. Vouillon* (14 Jur. 66).

As to replications of *de injuria*, see *Webb v. Spicer et al.* (13 Q. B. 886-895), (the replication traversed the alleged agreement) ; also see *Chit junr.*, Forms 293 a. b. note (e), 1 M. & G. 720 note, 6 M. & G. 852 note, *Garrard v. Hardey* (5 M. & G. 471), *Bell v. Tuckett* (3 M. & G. 785), *Scott v. Chappelow* (4 M. & G. 336), *Bonzi v. Stewart* (4 M. & G. 310-318), *Benham v. Earl Mornington* (3 C. B. 134), *Cowper v. Garbett* (13 M. & W. 33), *Watson v. Wilks* (5 A. & E. 237), *Herbert v. Sayer* (5 Q. B. 965), *Bennett v. Bull* (11 Jur. 1068, 1 Ex. R. 593, S. C.), *Eyre v. Scovell* (5 C. B. 703), *Tolhurst v. Notley* (11 Q. B. 409), *Crogate's case* (1 Smith's Leading Cases), *Scadding v. Larant et al.* (13 Q. B. 687.) The case of *Webb v. Spicer et al.* (13 Q. B. 886-895), supports, I think, the opinion above expressed if the pleas are good, although *de injuria* was not there replied, but there is much in that case to shew that the pleas are both bad in law, although the agreement is in writing and contemporaneous with the giving of the note ; because the agreement is collateral not between the plaintiff and the defendant alone but with other unnamed parties ; and undertakes that the notes shall not be sued upon until a future event.

The agreement and notes are alleged to have formed together one special agreement and not collateral the one to the other. If that had been the case, the plea would not only have been in denial of the making and indorsing the notes, as alleged ; but would be bad in itself, as being argumenta-

tive, and amounting to the double plea of *non fecit*; and that Crawford did not indorse *modo et forma* &c. The last mentioned case seems to shew this—and see *Brill v. Crick* (1 M. & W. 232), *Turner v. Davies* (2 Saund 150, notes 2 i. j. k. If the replication is good as to the first plea, it must be good as to the second plea also.

McLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Judgment for the plaintiff. *

* NOTE: After hearing the above opinion, *Phillpotts* remarked that he had contended the whole first plea would have constituted a good inducement to a special traverse that the plaintiff was holder of the note *modo et forma* alleged; and that, if so, it shewed it to be a plea in denial of that fact, however bad on special demurrer as being argumentative. The Chief Justice said, "that after having again referred to the plea, he thought such a special traverse would be demurrable:—*Flight v. MacLean* (16 M. & W. 51); a good special inducement should be an argumentative denial of the matter afterwards expressly traversed, and shew forth the facts by which the traverse could be sustained in evidence. But that the matter of the plea does not deny argumentatively that the plaintiff is indorsee of Crawford, or that he is not the holder of the note; that it does not shew that it was deposited with his solicitor; that it remained so in deposit until and after the time of action brought; that at the utmost it only shews that the plaintiff ought not to be the holder although he is indorsee in terms, it does not shew that he is not the holder in fact, because he may not have deposited it with his solicitor, as he ought to have done; but that is not alleged; and he may have received it from his solicitors." Should not a good plea that the plaintiff is not holder shew that some other person is?—*Fraser v. Welch et al.* (8 M. & W. 629), *Schild v. Kilpin* (Ib. 673), *Basan v. Arnold* (6 M. & W. 559).

COLEMAN V. SHERWOOD.

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(TWO CASES.)

Promissory notes—Collateral and contemporaneous agreement—Right to sue on the notes.

A, being owner of a schooner, mortgaged it to different persons, including the plaintiff and the defendant, respectively. A failed, and B. was appointed his assignee. A suit was then commenced in chancery to ascertain the rights of the parties. During the pendency of the suit all the parties thereto agreed to sell the schooner to one C., without prejudice to the issues raised, for the sum of £1,850, for which sum C.'s notes were taken. The defendant, desirous of participating in C.'s securities to the amount of £400, was allowed by the other mortgagees to take C.'s notes to that amount, on condition that he substituted notes of his own, indorsed in blank by D. for the same amount, which he did. These notes it was agreed should abide the result of the chancery suit. The result of the chancery decree was the rejection of all the mortgagees excepting the plaintiff. The plaintiff then sued the defendant on his notes. The defendant after plea pleaded, but before trial, appealed from the chancery decree. He did not plead the appeal *puis darrein continuance*.

Held, on the agreement and other evidence produced, that the plaintiff was entitled to recover against the defendant on his notes.

(First Case.)

ASSUMPSIT. Writ issued the 4th of June 1852. Declaration of the 26th of August 1852.

1st count stated that the defendant on the 5th of February 1851, made his promissory note in writing, and thereby promised to pay to the order of John Crawford £225 with interest, six months after date—elapsed, &c.; and the said John Crawford then indorsed the same to the plaintiff, and the defendant thereupon became liable to pay the amount thereof to the plaintiff, according to the tenor and effect thereof.

2nd count similar to the last, upon a promissory note, of like date and amount, payable twelve months after date, &c.

3rd count, account stated.

1st plea, dated the 8th of October 1852: as to the 1st and 2nd counts, “that at the time of making the promissory notes in those counts mentioned an action, in which the plaintiff was plaintiff, and among others the defendant was defendant, was and is pending in the Court of Chancery for Upper Canada, in which action certain matters in dispute concerning a schooner called the “James Coleman;” and for the purpose of selling the said schooner it was agreed in writing by and between the parties to the said action in chancery, by an agreement, signed and executed by all the said parties and the plaintiff at the time of making the said notes that the said schooner should be sold to Samuel Sherwood for £1,350, payable with interest in equal half yearly instalments, over a period of three years, to be secured by the said Samuel Sherwood’s notes with the indorsement of John Elmsley, and by a mortgage on certain real estate of the said Samuel Sherwood; and that the defendant was to have of these notes to the amount of £400 or £500, which were to be handed to the defendant on the defendant’s giving in lieu thereof corresponding notes of the defendant, indorsed by John Crawford; the said sale and handing over to the defendant of some of the notes of the said Samuel Sherwood alike to be without prejudice to the said suit in chancery, and without prejudice to any of the said issues therein raised, or in case the same should

be raised in any other suit or suits at law or in equity, and generally, without prejudice to any claim or question, of, by or between the parties to the said suit, or either of them, on the said, or any other grounds, subject in any case to the right of appeal by either party; and that the said notes in the declaration mentioned should be deposited with Messrs. Morrison, Connor & Macdonald, solicitors of the plaintiff, subject to the result of the said suit in chancery, or of any other suit that might be instituted to determine the rights of the several parties to the said schooner; and that the said solicitors should not in any way use, discount, or part with, or sue upon the said notes, or either of them, except by the order of some court of competent authority, or by the consent of the defendant, but that the same should remain in the custody of the said solicitors without any proceedings being taken or commenced for the recovery thereof whatever. And the defendant saith that there had not as yet been any order whatever of any court made, nor any consent whatever by the defendant that the said notes, or either of them, should in any way be used, discounted, parted with, or sued upon; and that the rights of the several parties interested in the said schooner still remain wholly undetermined, and that the said suit in chancery is still pending and undetermined." Verification.

2nd plea to 1st and 2nd counts—"That at the time the said promissory notes were made and given, it was by a certain agreement in writing then made between the plaintiff and the defendant, agreed and promised that in consideration that the defendant would give the said notes the plaintiff would wholly refrain from using or discounting the same in any way, or from bringing any action whatsoever thereupon, or in respect thereof, or the money secured thereby, until a certain suit in the Court of Chancery in Upper Canada, in which the plaintiff was plaintiff and the defendant one of the defendants, was, or should be finally settled or determined, and that the plaintiff hath no right therefore to bring this action for the recovery of the said notes against the said defendant." Verification.

3rd plea to 1st and 2nd counts—"That the promissory notes therein mentioned never were delivered to the plaintiff, nor was he at the commencement of this suit, nor is he the holder thereof, or either of them." To the country and issue.

4th plea to the 1st and 2nd counts—"That the defendant made the said promissory notes without any consideration whatever therefor; and that the plaintiff *held* the same without having given any consideration therefor; concluding to the country and issue.

5th plea to the last count—Non-assumpsit and issue.

Replication to 1st and 2nd pleas—*De injuria*—that the defendant of his own wrong, and without the causes, or any, or either of them, broke his promise, &c. Issue.

This case was tried before Mr. Justice McLean, at the last Toronto assizes, on Monday, the 10th of January 1853, when the plaintiff's counsel produced the notes declared upon, which appeared to have been made by the defendant payable to John Crawford or order, and by him indorsed in blank, and by protest annexed, to have been protested for non-payment at maturity, at the instance of the Bank of Upper Canada. The protest of the six months' note being dated the 8th of August 1851, and the twelve months' note, the 7th of February 1852. The last protest was stated to have been made at the request of the Bank of Upper Canada, as holders of the note.

Underneath Crawford's name on the back of the first note was written in pencil, "Acct. C., M. & McD.," and on the back of the second, "Morrison, Connor & Co."

The notes having been thus produced, the plaintiff's counsel closed his case.

The defendant's counsel then contended there was no evidence to prove the plaintiff holder of the notes at the time the action was brought, or to prove consideration therefor, the *onus* of which was by the issue as joined thrown upon the plaintiff. These objections were overruled.

For the defendant an agreement was then produced, dated the 5th of February 1851, and corresponding with that stated in the 1st plea, except that it only provided that

"the said solicitors were not to *discount, indorse, or otherwise part with the same notes*, or any, or either of them, except by order of some court of competent authority in that behalf, or by consent of all parties, and until such order or consent the said notes are to remain in the custody of the said solicitors," (with an exception respecting the notes of Samuel Sherwood, that as they became due and payable, the said solicitor may take the necessary proceedings to collect the same, &c.), but without the words contained in the pleas, "*or from bringing any action whatsoever thereupon or in respect thereof, or the money secured thereby*," or the words "*but that the same should remain in the custody of the said solicitors without any proceedings being taken or commenced for the recovery thereof whatsoever*."

In the margin was written a receipt from Samuel Sherwood, of the mortgage from him to M. W. Brown, and also the promissory notes therein mentioned, being the mortgage and notes in this agreement referred to; and also the notes of Henry Sherwood, indorsed by Mr. Crawford, therein also referred to, dated the 5th of February 1851, and signed Morrison, Connor & Macdonald.

This agreement was signed by the plaintiff, M. W. Brown, and the defendant, the plaintiff executing by his solicitors, Morrison, Connor & Macdonald.

The agreement was offered in evidence to show that the plaintiff had no right to *sue* in this action on the notes. For the plaintiff it was contended there was nothing in the agreement restrictive of a right to sue, although other restrictions are therein contained, and the learned judge acquiesced in this construction of it.

The defendants then proved orally that there had been a suit in chancery, a decree made, and an appeal therefrom still pending. The petition of appeal, &c., were proved by examined copies.

The plaintiff, in reply, produced the original decree in chancery in the suit of the plaintiff and the defendant and others. This evidence was not objected to. The bill and

answers were not produced, nor any of the mortgages referred to.

From the papers thus in evidence it appeared that the suit in chancery was heard on the 27th of June, 1851, and the decree made on the same day: that this suit was commenced on the 4th of June, 1852—pleas filed the 8th of October 1852, and the petition of appeal, &c., filed the Saturday preceding the trial—i.e., the 8th of January 1853.

The decree was intituled in a suit of James Coleman, plaintiff, and Henry Sherwood, Edward C. Jones, Mary Elizabeth Jones, David Ford Jones, and Michael Wilson Brown, defendants; and after referring to the evidence read, the exhibits referred to, (including the agreement in question, and the admissions made,) decreed that two mortgages therein referred to of the defendant and Edward C. Jones, and of the executors of the late Jonas Jones, were void for want of sufficient recitals, &c., &c., and dismissed the plaintiff's bill as against all the defendants except Brown, without costs; and further, it referred to the master to take an account of what (if anything) was due to the plaintiff upon his mortgage in the pleadings mentioned, and to tax costs as against Brown only, and that Brown, as assignee in the pleadings mentioned, should pay the plaintiff what (if anything) should be reported due to him, as aforesaid, "and upon such payment, or upon the report standing confirmed, finding nothing to be due, or finding that the plaintiff had been over-paid, it was ordered that the said plaintiff should assign and transfer the said agreement and the notes and mortgage therein mentioned, together with all deeds and writings in his custody or power relating to the said mortgage, to the said Brown, as such assignee as aforesaid, or to whom he should appoint." And if the master should find the said plaintiff over paid, he was, within seven days after notice, to pay the said Brown the amount so found to have been over paid. The petition of appeal was by the defendant against all the other parties, including the plaintiff and Brown; and his solicitor stated, as a witness, that the petition, bond, &c., had been duly filed and notice only

served on the plaintiff's solicitor for hearing an appeal on the 30th of June next.

The plaintiff then proved by Mr. Mowatt, solicitor for the said Brown, that Brown was assignee of the bankrupt estate of Coleleugh and Grier, and as such, interested in the schooner "James Coleman," and that the suit in chancery being terminated, he had frequently applied to the plaintiff's solicitor to collect the defendant's notes: that the defendant had spoken to him (witness) upon the subject in consequence of a notification from Mr. Macdonald of an intention to sue: that a suit in chancery may terminate as to some parties years before it is brought to a close as to others, and that the present suit was disposed of in the Court of Chancery.

The learned judge told the jury the plaintiff was entitled to recover as being holder of the notes, and entitled to sue unless restrained by the agreement; and that the suit in chancery being ended, and the action brought at Brown's instance, he did not think the proceedings in appeal, recently instituted, established the pendency of the matter in chancery, as pleaded: that he saw no breach of the agreement, and if there was any, the defendant's remedy was by action therefor.

The jury found for the plaintiff £504 17s. 4½d. damages.

During last term *Phillpotts*, for the defendant, obtained a rule calling upon the plaintiff to shew cause why such verdict should not be set aside and a new trial be had, the verdict being contrary to law and evidence, and for misdirection; or why the verdict as to the issues on the 3rd and 4th pleas should not be entered for the defendant, or a new trial be had thereon, the present finding on such issues being contrary to law and evidence, and for misdirection; and upon leave reserved at the trial.

McDonald shewed cause, and contended that as one part of the rule went to disturb the whole verdict, and the other part was limited to the 3rd and 4th issues; they should be considered separately:—

1st. As to the 1st and 2nd pleas, he submitted there was a fatal variance between the agreement as stated in the pleas

and as proved in evidence, the latter containing no words of restriction of the plaintiff's solicitors' suing, &c., upon the notes, nor was any such restriction implied in the terms stated, and express authority was given to collect Samuel Sherwood's notes—of course, in the name of the plaintiff, whose solicitors they were.

That the defendant's proof of the recent appeal proved that the suit in chancery was ended, and did not support the allegation in the plea of its pendency or of the rights of the parties being undetermined.

If it did, the plaintiff proved the decree, which shewed clearly that the rights of all parties were ascertained: that the notes were indorsed in blank, and delivered to the plaintiff's solicitors, under the agreement, and so held until the decree was made which determined the right so far as the defendant was concerned; and that, as to the state of the account between the plaintiff and Brown still remaining to be taken, it was of no consequence, because either the plaintiff or Brown must become entitled to the amount, and this suit is really instituted at the instance of Brown, of which the defendant had notice before action brought.

That if available, the appeal should have been pleaded *puis darrein continuance*.

And if admissible, the appellant has delayed it so long that laches may be objected to it—2 White & Tudor, 159.

As to the delivery to plaintiff, and his being holder, that the production of the notes *prima facie* prove both, in addition to which Brown's solicitor proved that the action was brought by the plaintiff at his desire.

That the *onus* was on the defendant to impeach the consideration before the plaintiff was bound to prove more than what the notes *prima facie* imported, besides which, ample proof of consideration was given before the trial ended, whatever might have been said at the close of the plaintiff's case.

Phillpotts, in reply—

1st. Gave up his objections to the want of proof of consideration.

2ndly. Contended the issues should have been found for him which raised the question, whether the note was indorsed and delivered to the plaintiff, and whether he was the holder. That the mere signature of Crawford on the back of the notes did not prove the indorsement and delivery to the plaintiff, and that even the signature was not proved.

That the portions of the declaration not traversed do not constitute evidence in support of the issues to prove delivery, and that the plaintiff was holder, and therefore the signature should be proved to be available as evidence—Edmunds v. Groves, 2 M. & W. 642; Bennion v. Davison et al., 3 M. & W. 179; Doe Norton et al. v. Webster, 12 A. & E. 442; Johnstone et al. v. Friedmann, 2 M. & G. 434; Bonzi v. Steward, 4 M. & G. 295, 329.

That the agreement is stated in the 1st and 2nd pleas according to its legal effect, and that when not descriptive, if an agreement be so stated, though in other words than the agreement itself contains, it is sufficient; and that an undertaking not to sue, &c., as alleged, is implied on the face of it, and therefore there was no variance.

That if a good objection, he had moved and obtained leave to amend at the trial—(as to this the learned judge says he granted leave, of which the defendant's counsel did not avail himself after receiving an intimation from the court that it would render his plea insufficient—Bowers v. Nixon, 2 C. & K. 372).

He submitted that if too late now to amend, a new trial should be granted on terms, to admit of it upon an application hereafter.

That suing imported a *parting* with the notes until the rights of all parties were determined, which had not yet been done, as no final decision thereof could be made until the result of the appeal, and until the accounts referred to the master by the decree in chancery were known: that as yet it is uncertain who is to become entitled to the notes or to the amount, and that if the defendant had paid the plaintiff he might be called upon hereafter to pay over again to Brown, or to some other party to the bill in chancery, and

while *in dubio*, that state of things shewed that the plaintiff was not the indorsee or holder of the notes: that the plea alleged more than the mere pendency of the suit in chancery, and required proof that all had been done that was necessary to render the plaintiff the absolute and unconditional owner of the notes; and that the appeal, however recent, established the plea by proving that the rights of the parties were not finally determined.

COLEMAN V. SHERWOOD.

(*Second Case.*)

INFERIOR JURISDICTION—ASSUMPSIT. Writ issued 11th of November, declaration 24th of November, 1852.

1st count stated that the defendant, on the 5th of February 1851, made his promissory note, and promised to pay to the order of John Crawford, £50 with interest, eighteen months after date—elapsed, &c.; and the said Crawford then indorsed the same to the plaintiff, and the defendant became liable to pay the amount to the plaintiff, according to the tenor thereof, &c., and in consideration thereof promised to pay the said sum of money and interest to the plaintiff.

Pleas (11th December 1852)—1st and 2nd similar to 1st and 2nd in last case (a). 3rd—Similar to 3rd in last case (b) and issue. 4th plea—That the said Crawford did not *indorse* the said promissory note to the plaintiff as in the declaration alleged; concluding to the country and issue.

Replication to 1st and 2nd pleas, *de injuria*.

Special demurrer to replication to 1st and 2nd pleas, and joinder in demurrer (c).

This case was also tried before Mr. Justice McLean at the last Toronto assizes, when the plaintiff's counsel produced the note declared on, made by the defendant, payable to the order of John Crawford, and by him indorsed in blank, and protested on the 7th of August 1852 for non-payment, at the request of the Bank of Upper Canada, holders thereof. On the back was written in pencil, beneath the signature of Crawford, "Sect. Alexander

(a.) Ante pages 373-4. (b.) Ante page 375. (c.) Ante page 359.

McDonald." The protest was annexed. The note being put in, the indorsement or signature of the payee indorsed was admitted, and the plaintiff's counsel then closed his case.

The same objections were taken as in the last case, and the same evidence adduced on the part of the defence, and the jury, under the direction of the learned judge, found for the plaintiff £56 5s. 10d. damages.

In the following term, *Phillpotts*, for the defendant, obtained a rule upon the plaintiff to shew cause why such verdict should not be set aside and a new trial be had, as being contrary to law and evidence, and for misdirection; or in the alternative, as in the last case ^(a).

The arguments in the last case apply equally to this ^(b).

McDonald, for the plaintiff, referred to *Thimbleby v. Barron*, 3 M. & W. 210.

Phillpotts, in reply, contended the plea, denying the alleged indorsement, was sustained by the evidence.

MACAULAY, C. J.—It may be inferred from the evidence that Brown was the assignee of Colcleugh & Grier, bankrupts, who before their bankruptcy owned the schooner "James Coleman," and had mortgaged her to the plaintiff: that both the plaintiff and the defendant, with the other defendants in the suit in chancery (except Brown) claimed to be respectively mortgagees of such vessel, and that the rights of those parties to be so regarded gave rise to the suit in chancery, in which Brown represented the mortgagor.

That the vessel was in the possession, or under the actual control of the plaintiff, and that Samuel Sherwood agreed to purchase her from all parties, both mortgagor and mortgagees.

That the defendant desired to participate in the negotiable securities to be given by Samuel Sherwood for the payment of the purchase money to the extent of £400 or £500, but the amount of his claim against the vessel as mortgagee, or against the bankrupt estate, does not appear.

That the other parties who were contesting his right as mortgagee would not consent to his wishes unless he sub-

(a) Ante page 378. (b) Ante page 378 et seq.

stituted for the notes of Samuel Sherwood to be received by him notes of his own, indorsed by Crawford, of equal amount.

That this was done under the terms specified in the agreement of the 5th of February 1851, and the effect was to enable the defendant to receive £400 or £500 from Samuel Sherwood.

Had no such arrangement taken place all the notes of Samuel Sherwood would have been deposited with the plaintiff's solicitors, to abide the result of the suit in chancery ; and as he was to pay them, at all events, his notes were to be collected as they became due and payable ; but it was uncertain until the rights of the parties were determined by the result of the chancery suit, whether the defendant would be bound to pay his notes or not.

The defendant's notes became payable, respectively, on the 8th of August 1851, and the 8th of February 1852.

The decree in chancery was apparently made on the 27th of June 1851, before either of them became due (it was said by the plaintiff's counsel not in fact to have been made till after they were due, but this was not acceded to by the defendant's counsel), and the result of the chancery suit was to reject all the mortgages except the plaintiff's, which stood good ; wherefore the amount received by the defendant through Samuel Sherwood's notes, subject to such result, is to be reimbursed by him through the medium of the defendant's notes. The defendant may still be a creditor of the bankrupt estate to the amount claimed by him as mortgagee ; but if the defendant's notes had been at once transferred to Brown, under the decree, and he was suing the defendant instead of the plaintiff, I apprehend the defendant could not set off such debt as against Brown, the assignee, any more than as against the plaintiff ; consequently the plaintiff suing, instead of Brown, does not militate against the defendant in that respect.

The construction and effect of the agreement is, however, not unattended with difficulty.

It is to be borne in mind that it was contemporaneous with, though collateral to, the making and indorsing of the

notes in suit, at a time when the chancery suit was pending, and the rights of the litigant parties still undetermined, and that the notes were to become payable at future periods of six and twelve months, before the first of which a decree was made which did determine, so far as the Court of Chancery was concerned, the rights of all parties.

It is contended, on behalf of the defendant—1st, that the result of the suit in chancery in the true intent of the agreement, means *final result*, as might be determined upon appeal—a right to which was therein reserved to all parties, and that the matter is still pending in appeal.

2nd. Also, that by the agreement the notes are not merely to be deposited with and kept in the custody of the plaintiff's solicitors as agents, trustees or bailees, of all concerned, but that they were not to be by them parted with except upon order of some court of competent authority, which meant the Court of Chancery, or of Appeal, according as the ultimate result might be in one court or the other.

The plaintiff contends the agreement in every point of view varies from that stated in the 1st and 2nd pleas, and does not support either. The defendant replies, that even if there was any variance (which he denied) the evidence applied to the 3rd plea, and sustained it; consequently the case is to be considered :—

1st. With relation to the 1st and 2nd pleas; and as to them—1st, upon the objection of variance—2nd, upon the evidence, if there is no variance.

2nd. With reference to the 3rd plea, denying any delivery of the notes to the plaintiff, or that he was the holder thereof at the time the action was brought :

1st. The consideration is, whether the agreement proved varies from the plea in substance or effect. The words of the first plea, to which this objection applies, are, "that the said solicitors should not in any way (*use*) discount, or part with (*or sue upon*), the said notes, or either of them, except by the order of some court of competent authority, or by the consent of the defendant, *but that the same should remain in the custody of the said*

solicitors, without any proceedings being taken or commenced for the recovery thereof whatever."

In the second plea, that the plaintiff agreed that he would "wholly refrain from using or discounting the same in any way, or (a) from bringing any action whatever thereupon, or in respect thereof, or the money secured thereby, until a certain *action* in the Court of Chancery, &c., was or should be *finally* settled or determined."

The words of the agreement are: "the said solicitors are not to *discount, indorse, or otherwise part with the same* notes, or any or either of them, except by order of some court of competent authority in that behalf, or by consent of all parties; and until such order or consent the said notes are to remain in the custody of the said solicitors." The agreement speaks of *discounting, indorsing, and otherwise parting with* only—not of *using, suing upon*, or taking *any* proceeding for the recovery thereof.

I am disposed to think the variance substantial.

It was probably the intention that the notes were not to be *used* or *sued upon* until the event with a view to which they were deposited, but the agreement says nothing about it; and if no steps were to be taken for the recovery thereof, I do not see how a presentment at maturity could be made to the maker, or notice be given to the indorser, without which he would be discharged, for he is no party to the agreement. If the words used, "*discount, indorse, or otherwise part with,*" in connexion with the rest of the agreement, import or involve an undertaking on the plaintiff's part not to sue or take any steps to collect these notes, there was no necessity for super-adding such terms in the plea—unless the object was brevity, and to save the necessity of stating other portions of the agreement material to support such allegations.

There is another variance, in words at least. The plea states that the notes were to be deposited with the plaintiff's solicitors, "subject to the result of the suit in chancery, or of any other suit that might be instituted to determine the rights of the several parties to the said

(a) *Quere, and.*

schooner;" whereas the words of the agreement are : " Subject to the result of the present suit, in the event of the claims of the several mortgagees being disposed of, and declared therein, or in case the same shall not be declared in that suit, then, of any other suit that may be instituted to determine the rights of the said plaintiff and the other parties hereto," i.e., to the said agreement.

There is also this further variance, that the agreement in writing is alleged to have been made by and between the parties to the said suit in chancery, signed and executed by *all* the said parties and the plaintiff at the time of the making of the said notes, &c., whereas it is not made by and between, or signed by *all* the said parties, but only by the plaintiff, defendant and Brown, omitting the *other parties* ; and this reference to the agreement is *descriptive*, not stating it merely in substance, if that could cure the variance.

The case of Webb v. Spicer et al. (13 Q. B. 886, 895), shews how material the allegation of an agreement that the solicitors should not sue may be—See also, Ford v. Beech (11 Q. B. 852), and Gibbon v. Vouillon (14 Jur. 66).

If there is a variance, the case cited of Bowers v. Nixon (2 C. & K. 372), shews that, being advisedly so varied, an amendment under the statute ought not to be granted.

But, supposing the variance immaterial, it becomes necessary to consider how far the evidence supports the pleas in other respects, or (with reference to the 3rd plea) shews a non-delivery to the plaintiff, or that he was not the holder when the action was brought, or, as to the case in the inferior jurisdiction, that the plaintiff was not indorsee of Crawford, *modo et forma* alleged.

I think the agreement shewed on the face of it that the suit in chancery was pending at the time it was entered into, and its continued pendency would be presumed till the contrary was proved.

The appeal proved by the defendant, in addition to the agreement being long since the plea, and not pleaded *puis darrien continuance*, nor shewn to have been preceded by a *caveat* following promptly upon the decree, and before action brought, did not prove that the suit in chancery was

pending when this action was brought; for the decree having been pronounced on the 27th of June 1851, and this action brought on the 4th of June 1852, long after both notes had become payable, nearly a year had elapsed between the decree and this action. The plaintiff declared on the 26th of August, and the pleas were entered the 8th of October 1852, and yet there was no appeal until the 8th of January 1853, a few days before the trial, and after all the costs of taking the cause down to *Nisi Prius* had been incurred.

Nor do I think the object of proving the appeal was in order to show the continued pendency of the chancery suit, so much as to establish that the rights of the several parties interested in the schooner still remained (as alleged in one plea) wholly undetermined. Whatever the object was, I am disposed to think the plaintiff was, under the replication of *de injuria*, entitled to prove by the decree that the suit in chancery was not pending when the action was brought, or rather that the result had been attained, upon the event of which the rights of the parties and (as a consequence) the right to the notes in the suit depended.

Indeed, no objection was made to the proof of the decree, coming as it did in reply to the defendant's proof of the appeal, to shew the right still undetermined.

Then, being proved, and its contents shewn, the defendant, as I understand, objects that even if conclusive upon the question of right, it makes order respecting the disposal of the notes according to the result of the account to be taken between the plaintiff and Brown, not shewn to have been yet accomplished, and that it is inconsistent with the plaintiff's right to receive the notes and sue the defendant thereon as indorsee in the interim, even though with Brown's verbal assent or request.

What then is the substance of the agreement as respects these notes? It required them to be made by the defendant and *indorsed* by Crawford; no indorsee being named, it will, I suppose, be intended his was to be a general and not a special indorsement—in other words, that it was to be in blank and not in full to the plaintiff; and, although the

pleas do not allege a blank indorsement, the notes were in fact so indorsed—*Adams v. Jones* (12 A. & E. 435). Thus indorsed, they were delivered to the plaintiff's solicitors apparently by Samuel Sherwood. They were received by the solicitors according to the agreement, but they are not parties thereto.

Now, stopping here, I think it must be intended that the notes were *made* and *indorsed generally*, in the full sense of these terms, for such was the agreement. They were made by the defendant to the payee, and he indorsed and parted with, or delivered them; so far as he was concerned he was no party to the agreement, and stood in the ordinary position of, it may have been, an accommodation indorser.

The person to become entitled to sue thereon as such indorsee, was to depend upon future events.

The agreement, though contemporaneous with, was collateral to the notes (a)—they were in themselves absolute—the terms of the agreement rendered them to a certain extent conditional between the parties; but a day was fixed when they were severally, by their own terms, to become payable. The suit in chancery was pending. The plaintiff may be assumed to have had possession or control of the vessel. All united in selling her to Samuel Sherwood. Under the circumstances, the plaintiff, defendant and Brown, enter into the agreement (the other defendants in the chancery suit not having signed it), by which it appears Samuel Sherwood had agreed to buy the schooner—from whom, and with whom did he agree? I think, from and with the three parties to this agreement, (or possibly all parties to the bill in chancery) to be secured by his (Samuel Sherwood's) own notes, indorsed by Elmsley—I suppose in blank (it is not shewn how)—and by a mortgage, which mortgage appears by the receipt of the solicitors to have been made to Brown. The defendant was to have of these notes to the amount of £400 or £500, on his giving in lieu thereof corresponding notes (i.e., in amount and periods

(a) *Webb et al. v. Spicer*, 18 Q. B. 888, 889.

of payment), indorsed by Crawford. These notes were to be as complete in themselves as those received for them: that the defendant received the notes of Samuel Sherwood is not disputed. The sale and interchange of notes was to be without prejudice to the suit in chancery then pending, and in which the present plaintiff was plaintiff and the defendant one of the defendants. Then it was agreed that the residue of the notes received from Samuel Sherwood, and those received from the defendant, were to be deposited with Messrs. Morrison & Co., solicitors for the plaintiff, subject to the *result* of such suit in chancery, in the event of the claims of the several mortgagees being disposed of and declared therein. By whom were the notes to be received, and who was to deposit them with the plaintiff's solicitors? It was agreed that the mortgage (i.e., of Samuel Sherwood) should be delivered to the plaintiff through his said solicitors, and that he, through his said solicitors, but not otherwise, should hold the said notes and mortgage in the same manner as he then held possession of the schooner, which means, not that he should not hold otherwise than through his solicitors, but not otherwise than as he held the vessel. The receipt of such solicitors in the margin of the agreement imports that all the notes and the mortgage were received by them from Samuel Sherwood. If so, he must have received them from the indorser after being indorsed, and have delivered them with the mortgage to the plaintiff's solicitors. This seems to shew that the plaintiff was to hold the defendant's notes through his solicitors, in the same manner as he then held possession of the vessel, but not otherwise, for so I understand it—meaning not otherwise than as a mortgagee of the vessel, and, according to the result of the chancery suit respecting his claim to priority, &c., as such, as the concluding part of the agreement, I think, demonstrates. It was likewise agreed that the said solicitors were not to discount, indorse, or otherwise part with the same notes (meaning the notes of both Samuel Sherwood and the defendant), or any or either of them, except by order of some court of competent jurisdiction in that behalf,

or by consent of all parties ; and that until such order or consent they were to remain in the custody of the solicitors, except that as Samuel Sherwood's notes became due and payable, the solicitors might take the necessary proceedings (in whose name?) to collect the same, and when collected, the money received thereon to be held subject to the same conditions in all things as therein contained, in respect of the said notes and mortgage. This part of the agreement, it is contended, controls the previous clause respecting the result of the suit, and subjects them moreover, to the result of an order of court, or the consent of all parties. Now, all parties means the plaintiff, defendant and Brown ; and, independently of the rule of construction, that the first words in a deed, and the last in a will, are to prevail—or, more properly, that the whole is to be taken together to elicit the intent (a), if the restriction was against suing or collecting as well as against discounting, indorsing, or otherwise parting with them, the defendant by withholding assent might effectually avoid paying his notes in any event unless under an order of court. It is not probable that such was the meaning of the parties ; but rather, that while in abeyance, as it were, the notes were not to be negotiated without the assent of the three parties ; and if so, the provision respecting an order of court would be of like import, both having relation to discounting, indorsing, or otherwise parting with the notes, none of which terms include *suing*, &c. They were not to discount them, nor was the plaintiff ; they were not to indorse them, nor was he ; nor were they to part with them in violation of the trust reposed in them, but were to hold them subject thereto, as if the words “ in the mean time ” had intervened between, “ not ” and “ to discount.” The words “ otherwise part with,” are no doubt, comprehensive enough in themselves to prohibit a delivery even to the plaintiff, without the defendant's assent, or an order of court, if that is the meaning that ought to be attached to them. But I am not satisfied that they do mean such a restriction, except *sub modo*—that is, in

(a) Shep. Touch., p. 88, No. 6.

subservience to the result of the suit upon the conflicting claims of the parties; the true meaning seems to be, that until a decree, the solicitors were not to part with the notes without an order, but that as exigencies might arise before the decree, rendering some such step expedient, the solicitors were to be authorised by joint consent, or an order of court. The notes might have become due before the chancery suit had decreed the rights of the parties. What in that event was to have been done? Or maturing as they did, after the decree, what was to be done? Was any person as holder (and if so, who?) to present them for payment, and if so, was the defendant bound to pay them when presented? if not presented, or if he was not liable to pay upon their being presented, how was the indorser to be held liable?—for if not duly notified of non-payment he would be discharged, and if the maker was not bound to pay, neither would he (the indorser) be bound to do so. This tends to shew that the agreement was *collateral* to the notes, and that after they became due the defendant could not resist payment—(13 Q. B. 888 *supra*). But, independently of this, the spirit of the agreement was, that the notes were to remain in deposit with the solicitors, not until the chancery suit was finally ended, but subject to the result of that suit in the event of the claims of the several mortgagees being disposed of and declared therein. And it did result in their being disposed of, and declared against the defendant, and in favor of the plaintiff. The event, therefore, accrued, which entitled the plaintiff to the notes, in other words, to the price for which the vessel had been sold—i.e., so far as the defendant was interested or concerned.

Further than this, however, the parties and the Court of Chancery have apparently considered that an order of court was proper, if not necessary, touching the disposal of all the notes and Samuel Sherwood's mortgage, for though entered into pending the suit in chancery the agreement seems to have been by mutual consent submitted to the control of the court; the decree recites some portions of it, and refers to the residue, and then directs the plaintiff (treating him as having the control over them) to assign

and transfer the same to Brown, upon Brown's paying him the balance found due to the plaintiff (if any), or if nothing due, then, upon that fact being reported by the master. It appears, therefore, that there is a specific order of court on the subject, positive as against the defendant, but contingent as to the party ultimately to be entitled to recourse against him. It may be asked, why provision was not made for collection of the notes at maturity, if the account was not taken before they became due, if it was intended that they should be collected before the result of the account was ascertained. It may have been overlooked, or deemed unimportant. A few words on that head would have obviated all the present difficulty. In the mean time, however, the decree evidently regards the plaintiff as the holder, or as having the control over his solicitors, for he is ordered to transfer their notes to Brown, which he could not do if not in his power, and the court would not order him to do what he could not do; no order is made upon his solicitors, and in the interim, while the account is being taken, the matter is only *in fieri* between the plaintiff and Brown. This decree preceded the maturity of the notes; but if the hands of both the plaintiff and Brown are tied up under the agreement and order until the result of the account is reported, the notes may become outlawed; and one test of the defendant's liability is, whether the Statute of Limitations was running in his favor at the time this action was brought. I am disposed to think it was, and that the order of the court being for the benefit or protection of Brown, the plaintiff might at once have transferred the notes to him; or he, Brown, might, in his discretion, consent to a modification of the order as between himself and the plaintiff, so far as to concur in the plaintiff's proceeding at once to collect the notes as holder—subject of course as to the proceeds to the result of the account, if not already taken or known, instead of requiring the plaintiff to hold the notes until bound to transfer them to him, Brown, pursuant to the order of the court. The plaintiff may not have been willing to transfer the notes to Brown at once; and it may

be important to Brown that the money should be collected to enable him to pay the plaintiff in redemption of the mortgage held by him upon the vessel. At all events, an order is made, and the parties beneficially interested in the notes thereunder mutually concur in the present action being brought by the plaintiff for their joint advantage. If the plaintiff, in anticipation of the master's report of the account, had transferred the notes to Brown instead of bringing this action, Brown might have forthwith sued the defendant as the plaintiff's indorsee; and if so, it seems to shew that the plaintiff is holder, and may sue in his own name consistently with the decree—doing so at Brown's instance and request, preceded by notice thereof to the defendant; or they might both have sued—*Ord et al. v. Portal* (3 Camp. 239), *Machell et al. v. Kinnear* (1 Star. 499). I think, therefore, the soundest conclusion is, that under all the facts in evidence, the result of the chancery suit is shewn in the plaintiff's favor as between the mortgagees—that the rights of the parties were declared therein—that an order of the court for the parting with the notes in suit by the plaintiff to Brown in a certain event was made—and that suing as the plaintiff does, with Brown's assent notified to the defendant (the event being shewn to have occurred), as he certainly might do if the event had occurred, and Brown was entitled to a transfer of the notes, the plaintiff is, as against the defendant, entitled to be regarded as having received delivery of the notes as indorsee, and as being the holder thereof at the time the action was brought. I may remark that the 3rd plea seems double, the delivery is a step in perfecting the indorsement before the notes became due, if a material averment by itself, without traversing the indorsement, which imports delivery—*Gardner v. Churchill* (7 T. R. 596)—being one defence, and the plaintiff's being holder at a future period when the action was brought being another defence. In my view, however, if correct, the evidence establishes both if it establishes either.

I have already observed that I do not consider the recent

appeal admissible evidence to support the pleas antecedently filed—*Todd v. Emly* (11 M. & W. 1).

I may add, that although the notes are made payable at a particular place, and not elsewhere, they are declared upon generally; but no objection has been taken upon this head, and the evidence shews that they were, in fact, presented at the place where they were made payable. I mention it because there may be ground for objection to a declaration so framed; and if so, I do not wish this case to be considered as an authorised precedent for declaring in the form adopted—*Sanderson v. Bowes et al.* (14 East. 500), *Dickinson v. Bowes et al.* (16 East. 110), *Exon v. Russell* (4 M. & S. 505), *Trinder v. Sniedley* (14 H. & W. 164), and *Waltman v. Walker* (Q. B. U. C. R.), not reported.

With reference to the evidence applied to the 3rd plea, I would mention the following cases—*King v. Molson* (2 Camp. 5), *Ord et al. v. Portal* (3 Camp. 239), *Smith v. McClure* (5 East. 476), *The King v. Lambton et al.* (5 Price 428, 444), *Carnaby v. Welby et al.* (3 A. & E. 372), *Marston v. Allen* (8 M. & W. 494), *Adams v. Jones* (12 A. & E. 455), *Abbouin v. Anderson* (1 Q. B. 498), *Hayes v. Caulfield* (5 Q. B. 81), *Wood v. Connop* (5 Q. B. 292), *Bell v. Viscount Ingestrie* (12 Q. B. 318), *Lloyd v. Howard* (15 Q. B. 995, 13 Jurist 149), *Palmer v. Richards* (15 Jurist 41), *Bromage v. Lloyd et al.* (1 Ex. R. 32), *Moss v. Hall & wife* (5 Ex. R. 46), *Carlett v. Booker* (5 Ex. 97), *Sainsbury v. Parkinson* (18 Law Times, 198), *Wilde v. Sheridan* (16 Jur. 426, 21 L. J. Q. B. 260).

Bowker et al. v. Burdiken (11 M. & W. 128, 147), as to escrows.

Bowerbank v. Monteiro (4 Taunt. 844), *Brill v. Crick* (1 M. & W. 232), *Brown et al. v. Langley* (4 M. & G. 467), *Adams v. Wordley* (1 M. & W. 374), *Thompson v. Clubley* (1 M. & W. 212), *Webb v. Spicer* (13 Q. B. 886) and cases therein cited, as to collateral agreements. The last case is calculated to render questionable the validity of the pleas in point of law, as setting up a collateral inconsistent agreement.

Of course the opinion expressed is in the plaintiff's favour in the inferior jurisdiction case, in which the indorsement is traversed equally with the other, for it applies to both questions alike,—i. e., whether the plaintiff was indorsee of Crawford, including delivery, and the holder, when the action was brought.

Having thus disposed of the case according to the best opinion I can form, assuming the pleas to be good in themselves, I may add, that there appears much in the case of *Webb v. Spicer et al.* (13 B. 887 to 889), and others therein referred to render the validity of these pleas questionable, upon the points suggested by me in the inferior jurisdiction case, upon demurrer.

The cases are, however, no doubt distinguishable, but regarding the agreement as collateral to the notes, and as being entered into with an additional party or additional parties, (unless the other party, Brown, or all the other parties to the suit in chancery are *prima facie* to be looked upon as the indorsees of Crawford, jointly with the plaintiff), the objection that arises to such an agreement being pleaded in bar of an action upon the notes, is very evident.

I do not, however, wish to be understood as intimating an opinion that the agreement, as it really is, and therefore the pleas (rejecting what is imported into them as restrictive of any right to sue upon the notes) may not constitute a valid defence. I, of course, have assumed that they do; but if reduced to that point, it is not clear that they do, and that a cross action for any breach of the agreement is not the proper, if not the only remedy. If any such remedy exists this decision does not anticipate the question, or preclude it.

MCLEAN, J., and SULLIVAN, J., concurred.

Per Cur.—Rule discharged.

NOTE.—After the Chief Justice read his judgment in this case, Mr. Phillips observed that he had not noticed his objection, that the mere production of two notes with the defendant's name signed thereto, corresponding in dates, amounts, and payee, &c., with the declaration, and with the name of the payee indorsed in blank, without any proof that such signature indorsed was the handwriting of the payee, did not support the declaration under the

EASTER TERM, 16 VICTORIA.

Present—The Hon. J. B. MACAULAY, C. J.

“ ARCHIBALD McLEAN, J.

“ *

PEGG AND BARBER V. PLANK.

Non-attendance of plaintiff as a witness when notified by defendant—Evidence of set-off.

It is no ground for setting aside a verdict for plaintiffs that one of the plaintiffs who had been notified to attend the trial by defendant, failed to attend, as he was not called for at the trial—defendant's counsel being also absent. Evidence of a debt due by one of a firm (plaintiffs) in his *individual* capacity will not support a plea of set-off to an action by the firm for a *partnership* claim.

ASSUMPSIT for goods sold and delivered.

Pleas—Payment, except as to the £17 paid into court; and set-off.

* The Honorable Robert Baldwin Sullivan, after a short illness, died during the last vacation, on Tuesday the 16th day of April, 1868.

3rd plea, that the notes never were *delivered* to the plaintiff, nor was he the *holder* thereof, &c. The Chief Justice then said he considered the objection taken on this point at the close of the plaintiff's case no longer of moment, after the evidence given on the defence; for that it appeared therefrom, in the opinion expressed above, that the notes had been delivered to his solicitors, through whom he held them subject to a certain event; and that the event had occurred upon which he became entitled to hold them absolutely: that the facts combined with the production of the notes, shewed that they had, in fact, been *delivered* by the payee, and *received* by the plaintiff, who was entitled thereto as holder, suing thereon as he did, with Brown's assent: that the identity of the notes in suit with those produced and those mentioned in the receipt of the plaintiff's solicitors was not only not denied but in effect asserted by the defendant, and involved in the defence set up—after which, that the payee had indorsed them in blank could no longer be questioned: that the defendant treated the signatures indorsed to be genuine, and met them by his defence accordingly, after which it would be inconsistent to go back and object that Crawford had not signed them—an objection which, if valid, would shew that the defendant had performed his part of the agreement by giving such notes, although not indorsed by Crawford, as they purported to be, and as the plaintiff's solicitors had assumed them to be in giving the receipt in the margin of the agreement. But that, had it rested only upon the plaintiff's evidence, he thought the production of the notes *prima facie* evidence that the plaintiff was holder, which he could not be if never *delivered* to him, and that such production also afforded evidence of delivery without proof of the signatures of Crawford indorsed thereon: that the indorsement was not denied, only the delivery, which would be involved in a denial of the indorsement, but that a denial of the *delivery* was not equivalent

The cause was taken in its turn and tried late in the last Toronto assizes, in the absence of Mr. Adam Wilson, the defendant's attorney and counsel.

It was proved in evidence, that the plaintiffs were grocers and liquor merchants in Toronto, and the defendant an inn-keeper in the country, and dealt with the plaintiffs in the purchase of liquors.

One witness proved an account produced for liquors, &c., between the 20th Sept. 1851, and the 15th May 1852, amounting to £70 5s. 10d., less £22 1s. 6d. being £48 4s. 4d., to be correct.

Another witness proved that he was in the employment of Cary & Brown in the city of Toronto, and that on the

to a denial of the indorsement, and if not, all not denied stood admitted; and that that part of the indorsement which related to the signature of the payee was not traversed, and therefore stood admitted.

Mr. Phillpotts submitted that such admission could not be taken as evidence to support the allegation of delivery without proof aliunde; but conceded that if the signatures were proved aliunde, the delivery would be *prima facie* sufficiently proved. To this the Chief Justice said, "If to prove delivery it was necessary to give evidence of the signature indorsed, I agree with him that the admission thereof involved in the narrowness of the traverse was not admissible evidence to prove his signature; but identity not being questioned, I think the signatures apparently indorsed, were to be assumed to be the indorsements so admitted, so far as the signatures were necessary parts of the indorsements, and no further; and that a special direction to pay the plaintiff ought to be inserted over the signatures, so as to render the blank indorsements special indorsements; which being done (as it is always assumed to be done at the trial, and is actually done, if necessary, or required), the only thing wanting to complete the plaintiff's title as indorsee—i. e., *prima facie*—was proof of delivery; and that in the absence of anything to the contrary, possession of the instrument, a declaration in writing by the party ostensibly entitled thereto beneficially, is *prima facie* evidence of delivery, if there are no subscribing witnesses to prove the fact: that where there are no witnesses, proof of the possession superseded the proof—the signature established the signing, sealing and delivery *prima facie*. A blank indorsement renders a note payable to bearer—See *Peacock v. Rhodes* et al., Doug. 632-8; *The King v. Milson*, 2 Camp. 5; *Ord et al. v. Portal*, 3 Camp. 239; *Low et al. v. Copestake*, 3 C. & P. 300; *Machell et al. v. Kinnear*, Star. 499; *Byles on bills*, 109, 110, 384, lb. p. 1, 119; *Clerk v. Pigot*, 12 Mod. 198; *Allen v. Cockwra*, 1 Sal. 126, *Anonymous*, 12 Mod. 345; *Vincent et al. v. Harleck* et al., 1 Camp. 442. See cases of lost bills—*Smith v. Chester* 1 T. R. 654; *Bosanquet v. Anderson*, 6 Esp. 43; *Smith et al. v. Clarke*, *Peake's cases*, 225, 1 Esp. 180; *Marston v. Allen*, 8 M. & W. 494, and cases ante *Taylor's Evidence* 100, 101, 264, sec. 271; *Mills v. Barber* 1 M. & W. 425; *Elkin v. Janson*, 13 M. & W. 654; *Lewis v. Parker*, 4 A. & E. 888; *Jacob v. Hungate* 1 Mood. & Rob. 445; *Brown v. Philpot*, 2 Mood. & Rob. 285; also, see *Wilde v. Sheridan*, 16 Ju. 426, 21 L. J. Q. B. 260, S. C., 11 Am. Eng. Rep. 880; *Buckley v. Ham*, 5 Ex. R. 43. It is the constant practice at Nisi Prius to regard a plaintiff producing a note payable to bearer to be the bearer by rightful delivery *prima facie*, and why not so here? Possession is evidence of delivery and holding."

30th Sep. 1851 he delivered three several casks of liquor to the plaintiffs' teamster for the defendant, but on the plaintiffs' account, who were the vendors to defendant—and the teamster proved the delivery to the defendant.

It was also proved that the whole account had been rendered to, and admitted by the defendant. The amount claimed being £70 5s. 10d. less credits admitted of £12 3s. 9d. one item of which was one barrel toddy whisky, £4 13s. 9d., leaving the balance £58 2s. 1d., and that the defendant admitted it to be correct; and promised to settle it if the plaintiffs would deduct £16 for the amount of an account he had against the plaintiff Barber, for meals, horse-keep &c., at the inn; but the other plaintiff, Pegg, objected to paying Barber's board as being a personal matter, for which he was solely liable.

On this evidence the jury found for the plaintiffs the full amount of £58 2s. 1d., less paid into court, £17, being £41 2s. 1d.

In the following term *Wilson* obtained a rule upon the plaintiffs to shew cause why such verdict should not be set aside, and a new trial granted on terms, upon reading the affidavits and papers filed.

R. Dempsey showed cause in the same term, and filed affidavits in reply, but not showing whether either of the plaintiffs were present at the trial, and if not, why not. Service of notice to the plaintiff Barber to appear, upon his attorney, was admitted in writing.

MACAULAY, C. J.—The only objection to this verdict that seems to me of much weight was the absence of the plaintiff Barber, which is alleged, and his presence neither asserted nor his absence excused. And had the defendant's counsel been present and called for him it might have materially embarrassed the plaintiffs' case. But he was not called for, and the evidence in chief fully warranted the verdict.

The merits of the defendant's case seem to be a demand against Barber alone, for meals &c., but unless it constituted a partnership liability the demand could not be proved in support of the set-off in this action; and if personally liable

only, the defendant has his remedy against Barber by a cross action.

I do not think we would be justified in setting aside the verdict—sustained as it is by adequate evidence, and not impeached otherwise than appears on this application (a).

McLEAN J., concurred.

Per Cur.—Rule discharged.

IN RE HENRY BELL V. THE MUNICIPALITY OF THE TOWNSHIP OF MANVERS.

A Township Council has no authority to declare the qualification of voters.

A by-law enacted by them for such a purpose must be quashed with costs.

This was a rule calling upon the defendants to shew cause why the by-law of the said Municipality, No. 65, intituled, "A by-law to delineate the property qualification of voters for the election of township councillors," and passed the 16th of February 1852, or so much thereof as should be considered illegal, should not be quashed with costs, on the ground that the defendants had no power to create a by-law for such purposes, &c.

The by-law enacted that the amount required to constitute a householder a voter qualified to vote at the election of township councillors in the township of Manvers should be the sum of £1; that is, if the house was built by the said occupant, or belonged to him, and valued at the sum of £1 by the assessor; and if the party were a tenant he should annually pay the sum of £1 rent, and said rent should be

(a) Mr. Jus. McLean having expressed doubts as to an item of £5 apparently recharged to defendant in the last account rendered, after having been credited in a prior one, the decision of the court was deferred to the 29th June 1853. The Chief Justice then said, that upon looking at the defendant's affidavit he at once recollected that he considered the objection answered, because the defendant did not say in distinct terms that there was an error of £5; that he annexed an account rendered to his affidavit, the first item of which was £17 1s. 6d. amount of account rendered for 1851, at the foot of which two sums are credited the defendant of £2 and £5. That he also annexed another account, in which the first item was, 1851 £22 1s. 6d., but he expressed himself on the subject of the last being erroneous so doubtfully, and its correctness in the affidavit filed in reply was so strongly re-asserted, that he considered it a mere conjecture of the defendant, and an untenable objection, and took no special notice of it.

paid on or before the 1st of January in each and every year. The returning officer, if he should think fit or proper, might swear the tenant respecting the payment of this rent, and if his rent were not paid, as above, the returning officer should not receive said tenant's vote.

Weller appeared as counsel for the defendants, and admitted that the by-law could not be supported, but he claimed exemption from costs on the ground that the by-law was passed in good faith, though inadvertently, and had not been acted upon or in anywise enforced.

Richards, for the applicant, referred to the provincial statutes 12 Vic. ch. 81 sec. 155, 14 & 15 Vic. ch. 109, sec. 35, and Schedule A. No. 21, as shewing that the allowance of costs is peremptory and of course when the by-law is quashed.

MACAULAY, C. J.—The 12 Vic. ch. 81 secs. 22, 122, 208 prescribe the qualification for voters, and the municipal council cannot infringe thereupon.—*R. v. Tappendon*, 3 East. 186; *R. v. Bird*, 13 East. 284. It is not contended the by-law was published according to the 14 & 15 Vic. ch. 109, Schedule A. No. 21, and that the application is too late.

This by-law, attempting to declare the qualification of voters, seems clearly bad; and the rule must therefore be absolute to quash it,—and with costs.

The act last mentioned does not leave us any discretion on this subject. The schedule is as strong to require the court to allow costs as it is to quash the by-law—which is not pretended to be discretionary, and the 35th section is peremptory.

McLEAN, J., concurred.

Per Cur.—Rule absolute, with costs.

IN RE HENRY BELL v. THE MUNICIPALITY OF THE TOWNSHIP
OF MANVERS.

A by-law passed by a township council, levying a sum of money to pay the costs of a contested election is illegal, and will be quashed with costs.

This was a rule calling upon the defendants to shew cause

why so much of the by-law of said municipality, No. 76, and intituled "A by-law to assess the township of Manvers for general purposes for the year 1852," passed on the 29th of April 1852, as provided for the levying, assessing and collecting the sum of £20 to pay the costs incurred upon the trial of the controverted election held for Ward No. 3 in the said township, mentioned in said by-law, should not be quashed, with costs, on the ground that defendants had no power to assess the township for such purpose, and that such part of said by-law was illegal and void.

The by-law enacted that for the then year (1852) there should be assessed, levied and collected in and for said township, for the general purposes thereof, for the year 1852, among others, the following sum, viz: £20, to pay the costs incurred upon the trial of the controverted election held for Ward No. 3 in the said township of Manvers; that said trial was barratrously, maliciously, falsely and vexatiously instituted and brought up against the election of a township councillor to represent Ward No. 3 in the municipal council of the township of Manvers by Porter Preston, a defeated candidate, contrary to the unanimous vote and well known wish and intention of the municipal council of said township, as expressed in by-law No. 60, passed upon the 1st of December 1851, ordering and directing said election to be held at Robert Gillis's, and that it amounted in legal terms to an error in the judgment of the township councillors for the year 1851, and likewise of previous years, and that under these circumstances the said township was obliged to pay all law costs so incurred.

The 2nd section of the by-law, directing the clerk to assess and apportion the sums to be levied upon all the ratable property, was not stated, as no objection was made thereto. The affidavit of Mr. Scott proved that the defendants were no parties to the matter litigated, which was between Porter Preston as relator, and Alexander Preston as a township councillor.

Weller shewed cause.

The following cases were referred to.

Regina v. The Town Council of Lichfield, 11 Jur. 888, 10

Q. B. 584 S. C.; *Regina v. Prest et al.*, 15 Jur. 554; *Eastern Counties Railway Company v. Broom*, 20 L. J. Ex. 196; 6 Ex. R. 314, S. C.; *Regina v. Mayor of Leeds*, 4 Q. B. 796, 12 L. J. 369, Q. B., S. C.; *Regina v. City Council of Lichfield*, 7 Jur. 670; *Regina v. Stamford Council*, 13 L. J. N. S. 177, 8 Jur. 558, S. C.; *Regina v. Dunn*, 8 Jur. 773, 5 Q. B. 959, S. C.; *Regina v. Thompson*, *Ib.* 477; *Regina v. Mayor, &c., of Bridgwater*, 10 A. & E. 281, 3 Jur. 1123 S. C.; *Regina v. The Town Council of Stamford*, 4 Q. B. 894; *Regina v. Mayor, &c., of Leeds*, *Ib.* 796.

MACAULAY, C. J.—The above references (especially the last three) shew that the by-law is an unauthorised application of the township funds. The council cannot apply them to support a contest, or indemnify one party in a contest of the kind in question.

Had the councillor elect, Alexander Preston, disclaimed, as he might have done, the municipality of the township might have intervened under the provisions of the statute 13 & 14 Vic. ch. 64, Sch. A. No. 23, subject to the provisions therein also contained respecting costs, but they did not do so; and Preston having defended the election in his own behalf, the council cannot now indemnify him for the costs at the expense of the township. The by-law must therefore be quashed, with costs, as to which see the last case. (a).

MCLEAN J., concurred.

Per Cur.—Rule absolute with costs.

MACDONALD v. THE HAMILTON AND PORT DOVER PLANK ROAD COMPANY.

Liability of Road Companies for accidents.

Road companies owning public highways and entitled to tolls for the use thereof, are liable for accidents arising from want of repair to the roads. They are liable to an individual sustaining special injury, as well as to the public, by indictment.

Case for injury to plaintiff's wife by the upsetting of a hired coach, in which the plaintiff and his family were

(a) Ante page 400.

travelling upon the defendants' road,—the accident having been occasioned by the bad and insufficient state of repair of such road. It was said to have been a government road, sold to the defendants under the provincial statute 12 Vic. ch. 5.

Plea—Not guilty.

The bad state of the road, and the injury in consequence, were proved.

It was objected by defendants' counsel at the trial :—

1st. That the state of the road should be proved by an engineer.

2nd. That the only remedy was by *indictment*, under sec. 35 of the provincial statute 12 Vic. ch. 84.

3d. That defendants were entitled to notice of action.

Leave was reserved to move on these points, and the case was left to the jury, who found for the plaintiff £50 damages.

Freeman, for plaintiff, moved to set aside such verdict, and to enter a non-suit on the above grounds, and on the the additional (4th) ground that the plaintiff's only remedy is against the coach proprietor, or at all events, that he alone could sue defendants.

The following cases were referred to—*Russell et al. v. County of Devon*, 2 T. R. 667; *The Mayor, &c., of Lyme Regis v. Henley*, 3 B. & Ad. 77; *Crisp v. Bunbury*, 8 Bing. 394; *Butterfield v. Forrester*, 11 East. 60; *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244-5; *The Mayor, &c., of Lichfield v. Simpson*, 8 Q. B. 65; as to double redress on statute and by action *Stevens v. Leacocke et al.*, 11 Q. B. 731, distinguishes between common-law rights infringed and those conferred by statute. *Albon et al. v. Pyke*, 4 M. & G. 421, S. P.; *Clayards v. Dethick et al.*, 12 Q. B. 439; *Marshall et al. Nichols*, 21 L. J. Q. B. 343, 12 Am. Eng. 466, S. C.; *Bigby v. Hewitt*, 5 Ex. R. 240-3; *Thorogood v. Bryan*, 8 C. B. 116; *Booth v. Monmouth Railway Co.*, 17 Law Times, 154 Q. B.—If an act of parliament casts upon any persons the obligation to execute a public work, and the omission to execute that work inflicts an injury upon a private

person, a person injured may maintain an action for the injury so sustained.

MACAULAY, C. J.—The defendants, owning the road as a public highway, and the duty of repairing it being upon them, and being entitled to exact tolls for the use thereof, it appears to me that, upon the principles of the common law, they are liable in this action to an individual lawfully using the road and guilty of no fault on his own part, for a special injury received, in consequence of the defendants' permitting the road to remain out of repair, as proved in evidence. Such want of repair may have been also a public nuisance as respected the public at large, and the defendants may have incurred liability to indictment. But, independently of any such liability, they are also liable for special injury and damage sustained by a private individual, for the default and omission, amounting to a public nuisance. I perceive no reason to doubt their liability in this action and on the evidence, and there will be no rule.

MCLEAN, J., concurred.

Per Cur.—Rule refused.

THE QUEEN v. JAMES ADAMS, WILLIAM MCGUIRE, JAMES MADISON ANDREWS, AND HENRY HOWARD MEREDITH.

Ejectment—N. P. record—Omission of appearance.

The court refused to disturb a verdict for plaintiff in ejectment, on the ground that the N. P. record did not contain the appearance filed, where the record set forth a notice by defendants limiting their defence, and a plea in the form given by the statute (14 & 15 Vic. ch. 114).

EJECTMENT for Lot No. 4, 1st concession, township of Hope. Original plaintiffs, the Chancellor, Master and Scholars of the University of Toronto, changed to the name of the Queen by the provincial statute 16 Vic. ch. 89.

Writ tested the 6th of September 1852.

The N. P. record was headed with the date of the 29th of September 1852, and in the first place set out the writ—directed to the above four defendants and Robert Crawford, *to appear* in sixteen days after service.

A *nolle prosequi* was then entered as to Crawford.

It is then stated that Adams and McGuire *did not appear as directed* by the said writ, but made default,—“therefore it was considered the said Chancellor, &c., (plaintiffs) do recover their possession of the said property in said writ mentioned, and also £4 2s. 8d. for their costs expended about their suit, and a writ to recover such possession and costs was granted accordingly.” Judgment signed the 29th of September 1852. Then it proceeded—“The 25th day of September 1852; the defendants Andrews and Meredith, give notice that they intend to defend for that parcel of land therein described, abutting on and lying to the east of a road or street recently opened and laid out by the plaintiffs, and alleged by them to be in the allowance for road between the said Lot No. 4 and Lot No. 5, 1st concession of Hope, which tract is bounded on the north, south and east by a fence, and on the west, by the said recently opened street. And the defendants say that the plaintiffs are not entitled to the possession of the said property for which the *defendants have appeared*—Therefore, &c.

An appearance for defendants Andrews and Meredith, by their attorney Kirchoffer, was filed on the 25th of September 1852, or rather as was explained as of that day, by the consent of plaintiff's attorney, though in fact upon a subsequent day.

The notice of trial, intituled as above, with the addition of Crawford's name included as a defendant, was served.

At the trial, before Draper, J., at the last Cobourg Assizes, the defendants' counsel (before the jury was sworn) objected to the insufficiency of the *Nisi Prius* record, the appearance of defendants not being therein stated as required by the statute.

The learned judge, however, proceeded, and the plaintiff obtained a verdict—the defendants not appearing personally or by counsel at the trial, after the jury was impanelled.

During last term *Vankoughnet*, Q. C., obtained a rule upon the plaintiff to shew cause why the record of *Nisi Prius* and verdict should not be set aside with costs, on the ground of irregularity; the appearance of the defendants Andrews

and Meredith not being stated, noted or referred to in the said *Nisi Prius* record—or on the grounds disclosed in affidavits filed.

The affidavits merely represented that it was intended by the defendants to set up a *bona fide* defence to this action by law; but that it was taken out of its turn as it seemed to them; but which is not otherwise established.

MACAULAY, C. J.—The statute 14 & 15 Vic. ch. 114, sec. 6, enacts “that in case an appearance shall be entered, the case shall be at once considered at issue, and the record for trial *shall be made up*, setting forth the writ, *stating the appearance with its date*, and setting forth the notice limiting the defence, if any, of each of the persons appearing, and also setting forth a plea in the form of the schedule B., which shall be the only plea allowed, and the remainder of the record being made up, as in other actions.

The form of plea concludes by saying that defendant had appeared.

I cannot persuade myself that this objection ought to prevail. If a valid one, it is amendable, and ought to be amended by the appearance filed.

But it seems to me that the appearance and date thereof is stated. The plea purports to have been pleaded by the defendants, and if in fact filed *pro forma*, by the plaintiff, it equally shews that the defendants appeared—gave notice limiting their defence, and pleaded thereto; and, if entered by the plaintiff, then he does, in making up the record of *Nisi Prius*, state the appearance with its date. If the notice and plea were transposed this would be still clear. It would then be stated, that on the 25th of September 1852 the defendants appeared and said the plaintiff was not entitled to the possession of the property mentioned in the following notice—stating it. As it is, the record, after stating the non-appearance and default of other defendants in the writ, proceeds to add that on the 25th of September 1852 the defendants Andrews and Meredith give notice that they intend to defend &c., describing the property, and concluding, “for which the defendants have appeared.” It is possible the appearance may have been upon a day

previous to the date of the notice (sec. 3); but as they may form concurrent acts (sec. 4), it is not to be presumed, but rather that they were upon the same day; and in this case it appears the fact was so, by the ante-dating of the filing of the appearance.

An amendment adding the date of appearance would merely introduce tautology on the record, for it would only then more distinctly appear that the appearance was entered upon the 25th of September, which is its present import.

McLEAN, J., concurred.

Per Cur.—Rule discharged.

GIBSON V. JAMES BOULTON.

HACKETT V. JAMES BOULTON.

[TWO CASES.]

Covenant for title—Damages.

In an action for breach of covenant for title and freedom from incumbrance the measure of damages is the purchase money and interest. The right to such damages is not lessened by the fact that plaintiffs have never been disturbed in their possession—if an incumbrance really do exist.

This was an action of covenant for seizin in fee and good title and right to convey certain lands free from incumbrances.—Judgment by default. Damages assessed at the price or purchase money paid and interest thereon.

M. C. Cameron, for the defendant, moved on leave reserved to reduce the verdicts to nominal damages, on the ground that the only incumbrances were two mortgages, including the lands sold and other lands, together far exceeding in value the amount secured thereby; that plaintiffs had never been prevented entering into possession or been disturbed; but it was not denied that the amount secured by the mortgages far exceeded the value of the two small tracts conveyed to the plaintiffs respectively, and the mortgagees had not released the same or joined in the conveyances to the plaintiffs. The plaintiff Hackett was shewn to have entered and ploughed up the ground, but to have abandoned the land when he discovered the incumbrance. The plaintiff Gibson was not proved to have actually

entered. Both repudiated the transaction and sought to recover back the purchase money and interest thereon.

MACAULAY, C. J.—*McKinnon v. Burrows* (3 O. S. 590), is in favor of damages to the extent found by the jury, and no authority has been cited that seems to us to warrant its reduction.

The plaintiffs expressed their readiness to relinquish all right or claim which the defendant's deeds gave them on receiving back the consideration money and interest, and I suppose there will be no difficulty on this head. If there should be, the defendant must take such course for relief as may be open to him under the circumstances of this action and recovery, and the repudiation on the plaintiffs' part, upon which they are founded and the damages have been awarded.

McLEAN, J. concurred.

Per Cur.—Rule refused.

BRUNSKILL V. MCGUIRE.

Action on note—Traverse of plaintiff being the holder.

Assumpsit on a promissory note, Payee v. Maker.

Plea—that after the making of the note, and before it became due, the plaintiff indorsed said note to a certain person whose name is to the defendant unknown, who is the holder thereof, &c.

Replication—"that the plaintiff was at the time of the commencement of the suit and still is the holder of the said note"—without this &c.

Held, replication bad, because it did not traverse that any other person than the plaintiff was the holder of the note at the time the action was brought.

Declaration (7th May 1853) on a promissory note made Oct. 9 1852, for £56 12s. 8d., 3 months after date—Payee v. Maker.

Plea by defendant—That after the making of the promissory note in the said declaration mentioned, and before the same became due, and before the commencement of this suit—to wit, on the 6th day of January, A. D., 1853—the plaintiff indorsed said note, and delivered the same so endorsed to a certain person whose name is to the defendant unknown, and who then became, and was, and still is the lawful holder thereof, and entitled to receive payment

- thereof, and that the said note still remains in the hands of said person so unknown to said defendant as aforesaid, and this the said defendant is read to verify, &c.

Replication,—That the plaintiff was at the time of the commencement of the suit, and still is, the holder of the said note, without this that the plaintiff indorsed and delivered the same in manner and form as the defendant hath in that plea alleged, and this the plaintiff prays may be enquired of by the country &c.

Demurrer to the replication, for the following causes: that the traverse tendered by the said replication is immaterial, because the question to be tried is, whether said unknown person was the holder of the note *at the time of the commencement* of this suit, not whether it was indorsed to him (*quære* “before due”); that said replication is argumentative and amounts to a departure from the declaration, because it is not inconsistent with said replication that the plaintiff may have indorsed away the note and subsequently acquired a new title; that said replication is double, because it tries to put in issue not only the indorsement of said note, but also the holding thereof by the plaintiff at the time of action brought; that the inducement to the traverse tendered by the said replication is in no way connected or inconsistent with the fact traversed; that the traverse tendered by said replication is contrary to the rules of pleading and too large, because it tries to put in issue the holding at the time of the replication filed, which is not averred in the plea, and because the inducement to that traverse and the fact traversed may be found different ways by the jury; that said replication is an argumentative denial of the holding of said note at the time of the commencement of this suit by the person in said plea mentioned as unknown to the defendant; and is in other respects uncertain, informal and insufficient, &c.

Joinder in demurrer.

The following cases were referred to.

Barber v. Lemon, 11 Q. B. 302; Basan v. Arnold, 6 M. & W. 559; Fraser v. Welch et al., 8 M. & W. 629; Schild v. Kilpin, *ib.* 675; Morton v. Thompson, 1 U. C. R. 178;

Watkins v. Nicolls, *ib.* 473; Arthur v. Beals, 1. Ex. R. 608; Bartlett v. Benson, 14 M. & W. 735; Rogers, et al. v. Chilton, 1. Ex. R. 862; Boys v. Joseph, 8 U. C. R. 273; Palmer et al. Gooden et al., 7 M. & W. 48; Thompson et ux. v. Wilson, 1 U. C. C. P., 562; The Bank of B. N. A. v. Ainley, 7 U. C. R. 33; Dickenson v. Clemow et al., 7 U. C. R. 421; Hembrow v. Bailey et al., 3 Tyr. 152; Com. Dig. "Pleader" G. 2; that the whole traverse may be demurred to where there is a fault in the denial or *absque hoc*, or for insufficiency in the inducement—Com. Dig. "Pleader" G.; 20 Comb. 245.

MACAULAY, C. J.—Upon referring to the above cases, I think the replication bad, because it does not traverse that any other person than the plaintiff was the holder of the promissory note at the time the action was brought.

The inducement to the present traverse would be a good inducement to such a traverse, because it would argumentatively deny what the *absque hoc* traversed; but in the present replication it is not an argumentative denial of the fact traversed—for, affirming the plaintiff to be the holder at the commencement of the suit does not deny even argumentatively that he did not indorse it over before due; and, as to the *absque hoc* itself, it merely denies an indorsement over before the note became due; and, consistently therewith, he may have indorsed it over *after* it became due, and before suit. My note in the case of the Bank of British North America v. Ainley, not reported in 7 U. C. R. 55, was as follows. (The Chief Justice here read the note, given below.) The only

BANK OF UPPER CANADA v. JOHN AINLEY, SENR.

(Three Cases.)

MACAULAY, C. J.,—These are three suits against the defendants as parties to a promissory note. The plea is, that before and at the time of action brought, the note had been indorsed to Smart, who was then the holder thereof. The plaintiffs traverse the indorsement to Smart, but not that he was holder at the time of action brought, and still. See the following cases: Basan v. Arnold, 6 M. & W. 559; Burroughes v. Hodgson, 2 9 A. & E. 499; Frazer v. Welch et al. 8 M. & W. 629; Schild v. Kilpin, 8 M. & W. 673, 9 Dow. 803; Herbert v. Sayer, 5 Q. B. 971; Barberv. Lemon, 2 Jur. 246; Arthur v. Beals, 1 Ex. 608; Morton v. Thompson, 1 U. C. R., 178; Brittain v. Lloyd, 14 M. & W. 733; Kemp v. Watt, 15, M. & W. 672, 682-3. The issue would be good if found one way, Burroughes v. Hodgson, 9 A. & E. 499—i. e. if found for the defendant that it was indorsed to Smart, it would then so appear, and that he continued holder at the time of the suit is not denied, the two together constituting a sufficient bar; but if found for the plaintiff that it was not indorsed to Smart *modo et*

difference is that in that case it was a simple traverse of the indorsement without any special inducement, as in the present case; but I do not see that it makes any difference; consistently with it and the current of authorities, I think we must hold the replication bad on special demurrer, and that judgment must therefore be for the demurrer.

The traverse being bad in law, it is probable the defendant might have passed it over and traversed the inducement, but it was nevertheless competent to him to demur to the whole traverse for the default in the denial.—See Stephen's Pleading, 5th edition, 1843, p. 217; Humbrane v. Bailey et al. (3 Tyr. 152), Foden v. Haines (Comb. 245), Cross Keys Co v. Rawlings et al. (3 Bing. N. S. 71), Gough v. Bryan (2 M. & W. 773), Com. Dig. "Pleader" G. 20 and 22.

McLEAN J., concurred.

Per Cur.—Judgment for demurrer.

TORRANCE V. SMITH.

Carriers by water—Liability for accidents by fire—Pleading.

Assumpsit.—Declaration, that the defendant owned the schooner "Elizabeth," and plaintiff at his request loaded her with 1634 barrels of flour, to be shipped from C. (in Canada) to O. (in the United States), to be safely and securely delivered—the dangers of navigation excepted. Breach, that the flour was wholly lost through negligence of defendant.

1st plea, as to 400 barrels;—that a fire happened on board of the schooner without any wilful negligence of defendant, by which the schooner and flour were destroyed.

2nd plea, as to the residue—related the accident as in first plea, and then averred that the said residue was rescued in a damaged state and delivered to plaintiff, who accepted it.

3rd plea, to the whole declaration—like the first in substance.

Held, that the Imperial statute 26 Geo. III. ch. 86, sec. 2, is in force in Upper Canada and exonerated defendant from his promise to deliver the flour, by reason of the accidental fire.

Held, also, on demurrer to the second plea, that it was not bad for duplicity.

forma it would not follow or be found or appear that he was not nevertheless holder thereof at the time of action brought. The latter is therefore the gist of the plea, and should have been traversed as suggested in suit of the above cases. Fraser v. Welch, 8 M. & W. 635, Alderson B., that the proper mode of replying would have been a special inducement that plaintiffs were the holders of the bill at the time of the commencement of the action, concluding with a special traverse that Smart was that time holder thereof, it may be that the plaintiff might have traversed both allegations, although *de injuria* would be a bad replication—Kemp v. Watt, 8 M. & W. 678. But the fact to be maintained is that the plaintiffs were the holders at the commencement of the suit, in which event Smart could not be such holder. Traversing the indorsement to Smart alone does not appear to me sufficient.

ASSUMPSIT—Declaration : for that whereas the defendant, before and at the time of making his promise, hereinafter mentioned, was the owner of a certain schooner or vessel, called the "Elizabeth," then in the Port Credit harbour, and bound from thence to Oswego, in the State of New York, one of the United States of America ; and thereupon the plaintiff, heretofore, to wit, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-two, at the request of the defendant, caused to be loaded in and upon the said schooner or vessel divers goods and merchandize, to wit, one thousand six hundred and thirty four barrels of flour in apparent good order, of great value, to wit, of the value of £2000, to be taken care of and safely and securely carried and conveyed by the defendant, as aforesaid, in and on board the said schooner or vessel, from Port Credit aforesaid to Oswego aforesaid, and then, to wit, at Oswego aforesaid, to be *safely and securely delivered* in the like good order and well conditioned to the plaintiff, *the dangers of the navigation excepted*, and in consideration thereof, and of certain freight and reward to the defendant in that behalf, the said defendant the~~ff~~ promised to take due and proper care of, and safely and securely carry, convey and deliver the said goods as aforesaid, the dangers of the navigation excepted ; but although the defendant then had and received the said goods and merchandize to be carried, conveyed and delivered as aforesaid, and although a reasonable time for the carrying, conveying and delivering of the said goods as aforesaid, had long since elapsed, yet the said defendant not regarding his duty, in that respect, nor his said promise, did not, nor would take care of and safely and securely carry or convey the said goods so shipped in and on board of the said schooner or vessel, as aforesaid, from the Port Credit aforesaid to Oswego aforesaid, and then, to wit, at Oswego aforesaid safely and securely deliver the same for the plaintiff, although no damage of the navigation did prevent him from so doing ; but, on the contrary thereof, he the said defendant so carelessly and negligently behaved and conducted himself, with respect to the said goods and

merchandize, that by and through the carelessness, negligence and improper conduct of the defendant and his mariners and servants, in that behalf, the said goods and merchandize, being of great value, to wit, of the value of two thousand pounds, became and were wholly lost to the plaintiff, to the plaintiff's damage of two thousand pounds, and therefore he brings suit, &c.

- 1st plea—The defendant, as to four hundred barrels of flour in the said declaration mentioned, says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that the plaintiff and defendant respectively, at the time of making the said promise in said declaration, were, and still are, liege subjects of our Lady the Queen; and that the said schooner or vessel in the said declaration mentioned was at the time of making the said promise of the defendant in the said declaration mentioned a British vessel duly registered according to the statute in such case made and provided; and that after the said flour was loaded in and upon the said schooner or vessel in the said declaration, and before sufficient time had elapsed for the delivery thereof at Oswego, as in the said declaration mentioned, to wit, on the day and year in the said declaration also mentioned, at Port Credit in the said declaration mentioned, *a fire happened in and on board the said schooner or vessel*, by accident, without any wilful negligence, carelessness, default, or misconduct on the part of the defendant or the master of the said schooner or vessel, or any of the defendant's mariners, servants or agents; by which said fire the said schooner or vessel and the said four hundred barrels of flour in this plea mentioned were, without the wilful negligence, carelessness or default of the defendant, or his mariners or servants, destroyed. And so the defendant saith, that for that cause and no other, he, the defendant, was unable to carry and deliver the said four hundred barrels of flour in this plea mentioned, according to his said promise in the said declaration mentioned; and this the defendant is ready to verify, &c.; wherefore, &c.

2nd plea—And for a further plea in this behalf as to the residue of the said flour in the said declaration mentioned, the defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that the plaintiff and the defendant, &c., (as in commencement of first plea) ; and that after the said flour was loaded in and upon the said schooner or vessel in the declaration mentioned, and before a sufficient time had elapsed for the delivery therefore at Oswego, as in the said declaration mentioned, to wit, on the day and year also in the said declaration mentioned, at Port Credit, as in the said declaration mentioned, *a fire happened in and on board the said schooner or vessel*, by accident, without any wilful negligence, carelessness, default, or misconduct on the part of the defendant, or the master of the said schooner or vessel, or any of the defendant's mariners, servants, or agents ; by which said fire the said schooner or vessel was, without the wilful negligence, carelessness, misconduct, or default of the defendant, or his mariners, or his servants, destroyed : for which cause, and no other, the defendant did not carry or deliver the flour in this plea mentioned according to his, the defendant's, promise, in the said declaration mentioned. And the defendant further saith, that the flour in this plea mentioned was, in a damaged state, rescued by the defendant from total destruction in said fire, in and on board the said schooner, and delivered by the defendant to the plaintiff, who accepted and received the same at Port Credit aforesaid, after said fire ; and this the defendant is ready to verify, &c. ; wherefore, &c.

3rd plea—And for a further plea in this behalf, the defendant saith, that after the said flour had been loaded in and on board the said schooner or vessel in the said declaration mentioned, and before it was possible for the defendant to carry the same to Oswego, according to the said promise in said declaration mentioned, to wit, on the day and year in the said declaration mentioned, at Port Credit aforesaid, a fire occurred in and on board the schooner or vessel, by accident, without the wilful negligence, carelessness or default of the defendant, or his mariners, or servants, by

which said fire the said schooner or vessel and the said flour were, without the wilful negligence, carelessness, or default of the defendant, destroyed. And so the defendant saith that for that cause, and no other, he was unable to carry and deliver the said flour according to his said promise in said declaration mentioned ; and this the defendant is ready to verify, &c.

Demurrer to the first plea, for the following causes :—

That it confesses that the flour in that plea mentioned was not delivered according to the promise in the declaration mentioned, and does not shew any legal excuse for such non-delivery, and does not aver or shew that the defendant was prevented from delivering the same by any of the dangers of the navigation, excepted from defendant's contract.

Demurrer to the second plea, because it confesses that the flour in that plea mentioned was not delivered according to the promise in the declaration mentioned, but does not shew any legal excuse for such non-delivery.

That it is not averred or shewn that the flour in that plea mentioned, which is thereby admitted to have been damaged, was damaged from any cause arising from the dangers of navigation which are excepted from defendant's promise.

That the said plea admits a breach of the promise alleged in the declaration, and does not aver or shew any discharge by the plaintiff to the defendant, or any satisfaction for the damage sustained by the plaintiff for or by reason of the breach of the contract of defendant, and is an informal and insufficient plea in the nature of a plea in accord and satisfaction. It does not shew either an accord or satisfaction. And, also, that it is not by the said plea shewn at what time the delivery by defendant and acceptance by the plaintiff, as therein mentioned, took place, and whether the same was before or after action brought.

That the said plea is double and multifarious, and sets up two distinct grounds of defence, either of which would, if the same were true, constitute a bar to the said action

as regards the residue of the said flour in the said second plea mentioned, in this, to wit, that it is not only alleged in the said plea that the defendant was prevented by the accident of fire and not by any negligence on the part of himself or his servants from performing his promise in that behalf, which would constitute a bar to the action as to said residue of said flour as aforesaid ; but it is also averred that defendant delivered to the plaintiff, and that the plaintiff accepted and received, the said residue of the said flour in the said second plea mentioned, which said flour was rescued in a damaged state from total destruction in said fire by defendant, which latter circumstance would also afford a defence as regards the residue of said flour in said second plea mentioned.

Demurrer to the third plea, because it confesses that the flour in that plea mentioned was not delivered according to the promise in the declaration alleged, and does not shew that the defendant was prevented from delivering the same by any of the dangers of the navigation excepted in defendant's contract.

Joinder in demurrer.

Galt, for the demurrer, argued that this was not case against a common carrier for breach of duty, but assumpsit upon a bill of lading or special contract with the owner of the vessel, not alleged to have been a common carrier at all, and contended—

1st. That the statute 26 Geo. III. ch. 86 sec. 2, relied upon by the defendant, was not in force, and did not extend to vessels engaged in inland navigation,—which all navigation upon the lakes and rivers in Upper Canada must be considered to be ;—referring to *Hunter v. McGowan*, 1 Bli. Rep. 573, which shewed that it extended only to sea-going vessels.

2nd. That, if in force, the defendant's liability having accrued under a special contract excepting only the dangers of the navigation, of which dangers fire is not one, and undertaking that the goods should be safely and securely carried, &c., the defendant was not within the protection of the statute, but liable by the terms and

force of his special agreement, which did not except accidents by fire—*Forward v. Pittard*, 1 T. R. 2; *Abbott on Shipping*, 389.

3rd. That the foregoing objections related to the first and third pleas, but that the second was further objectionable, as not alleging, with technical precision, that the plaintiff discharged the defendant from further performance of his contract, either before or after breach, as respected the obligation to carry the damaged flour, and was bad on that account; that the statute, however it might exempt him from liability for the *damage* done by the fire, did not exonerate him from all obligation to perform his contract in other respects so far as in his power; and that, unless rescinded by mutual agreement, the contract bound him to carry the flour to Oswego in some other vessel, which is not shewn to have been done.—*Wright v. Watts*, 3 Q. B. 94; *Chitty Jr. Forms*, p. 37.

He likewise objected duplicity to the second plea as framed.

Bell, for defendant, contended that it was immaterial whether defendant was a common carrier or not, as the statute equally protected him whether so or not, and that the plaintiff declaring in assumpsit on the special contract instead of in case could not alter the defendant's legal rights, or deprive him of the protection afforded by the statute to all ship-owners in like circumstances, without any special exception of accidents by fire being incorporated in the agreement or bill of lading.

That the statute is in force, and applies to vessels engaged in navigating the lakes and rivers dividing Upper Canada from the United States of America and bound to or from a Canadian port to a port in the State of New York, to which the present agreement was to carry. That, although relatively the navigation of the Clyde might be inland navigation in Great Britain, it is, relatively speaking, incorrect to call the navigation of the lakes and rivers along our exterior frontier inland navigation, being directly the reverse—as the present case demonstrates; for that the vessel, instead of navigating inland in Upper Canada was bound to a

foreign port, on the opposite side of Lake Ontario, out of Canada, and was, relatively speaking, in the nature of a sea-going vessel within the spirit and meaning of the statute, and of the case cited from 1 Bli.—He referred to *Sutton v. Mitchell*, 1 T. R. 18; stat. 7 Geo. II. ch. 15; *Coggs v. Bernard*, 1 Smith L. C. 82, and notes; *Abbott on shipping*, American edition, 468; case of the "*Morning Star*," *ib.*

He also contended that fire was impliedly excepted as a danger of the navigation; that it certainly was one of the dangers, and a great one, especially in vessels worked by steam, and was now taken to be included in the general exception of dangers of the navigation.

As to the second plea, that the contract, as alleged, was to carry in the vessel that was afterwards burned;—that performance became impossible, owing to an event, from the consequences of which defendant was exempted, even if the flour had been entirely destroyed, and, therefore, from the mere incidental breach of contract in not carrying it; that a sufficient excuse for the breach was stated; and that the plaintiff's receipt of the flour, after the fire, if not a discharge in terms, was a discharge in effect from the contract, if not put an end to by the fire and destruction of the vessel in which &c., and from all further liability on the defendant's part to carry the flour to Oswego; that a return of the flour was necessary to a complete defence, and the plea therefore is not double.

Galt, in reply, contended the second plea was bad, and the objections to it not answered, and that the plaintiff's receipt of the damaged flour was not pleaded in discharge of a contract, and that the plea is double, if it is so pleaded.

MACAULAY, C. J.—By the 26th Geo. III. ch. 86, sec. 2, it is enacted that no owner or owners of any ship or vessel should be subject or liable to answer for, or make good to any one or more person or persons, *any loss or damage* which may happen to any goods or merchandize whatsoever, which should be shipped, taken in, or put on board any such ship or vessel, *by reason or means of any fire hap-*

pening to or on board the said ship or vessel ; and, I think, this statute has force of law here, under the first provincial act of Upper Canada, and that it applies to ships or vessels employed in navigating the great lakes and in carrying by water in such ships and vessels from and to ports in Upper Canada and foreign ports in the United States of America.

I think it so applicable in spirit, and that the case cited of *Hunter v. McGowan* (1 Bli. Rep. 573) ought not to be extended and applied to ships or vessels engaged in such navigation.

I think the defendant entitled to the benefit thereof, although the contract for the carrying of the flour made no other exceptions than the dangers of the navigation, of which accidental fires may be assumed not to be one—*Forward v. Pittard* (1 T. R. 27), *Sutton v. Mitchell* (1 T. R. 18)—under the stat. 7 Geo. II. ch. 15, which exempts owners from *loss or damage* by reason of embezzlement, &c.,—*Tisdell v. Combe* (7 A. & E. 788).

I do not think the contract being to take care of and safely and securely carry makes any difference, or takes the case out of the statute. I consider the exception contained in the statute superadded by the legislature to these contingencies, which, at common law, exonerated the carrier from liability, though not excepted or expressly mentioned in the contract or bill of lading. The contract is supposed to be made with a view to the general law relative to the subject matter, and therefore subject to such exceptions as by such law pervade all such transactions,—*Coggs v. Bernard* (1 Smith L. C. 82, and notes), *Wilson v. Dickson et al.* (2 B. & C. 2), *Robinson v. Demamore* (1 B. & P. 416), 11 Am. Eng. Rep. 514 note,—where a case is cited of *Gaither v. Barnett* (2 Brevard 488) ; that where a common carrier undertakes to deliver safely he incurs liability for *unavoidable* accidents, from which he would have been otherwise excepted at common law.

Chit. Jur. Forms of assumpsit against common carriers, 95, note b., says “ the words *to be taken care of and safely and securely carried* import the absolute and extensive common law responsibility, and may not always be correct.”

GRANT V. HAMILTON, SHERIFF.

Action in County Court—Plea in abatement—Certainty.

The pendency of a suit for the same cause, &c., in a county court, may be pleaded in abatement to an action brought in this court.

Such a plea setting forth that defendant was served with and appeared to a writ issued from the County Court, at the plaintiff's suit, in trespass (the action pleaded to being trespass), as appears by the record, and then alleging as a matter of fact to be tried *aliunde* that the causes of action are identical, is bad. It should aver that the identity of the two causes of action *appears by the record*.

The plea in this cause, as given in the report, was also held bad for uncertainty.

TRESPASS. Declaration—For that the defendant, on the 22nd day of July, in the year of our Lord 1852, to wit, at St. Thomas, in the County of Elgin, with force and arms, &c., seized and took certain goods and chattels of the plaintiff, to wit, one mare of the plaintiff of great value, to wit, of the value of £20, and kept and detained the same from the plaintiff for a long time, to wit, for the space of ten days then next following, and then carried away the same, and converted and disposed thereof to his own use, whereby the plaintiff for and during all that time lost and was deprived of divers great gains and profits, which might, and otherwise would, have arisen and accrued to him from the use of the said mare, and for the work and services of the said mare, and other wrongs to the said plaintiff then and there did, against the peace of our Lady the now Queen, and to the damage of the plaintiff of £30; and therefore he brings his suit, &c.

Plea—The defendant prays judgment of the said writ and declaration, because he says that before the issuing the writ in this action, or the plaintiff's declaring thereupon, to wit, on the 22nd day of November, in the year of our Lord 1852, the plaintiff issued a certain writ of summons out of the County Court of the United Counties of Middlesex and Elgin, within the jurisdiction of the said County Court, against and directed to the now defendant, as sheriff of the said United Counties of Middlesex and Elgin, and whereby our Lady the Queen commanded the said now defendant that within eight days after the service of the said writ on the defendant he should cause an appearance to be entered for him in the said County Court of the United Counties of

Middlesex and Elgin, in an action of trespass, at the suit of the said plaintiff; and the said now defendant thereupon afterwards, to wit, on the 10th day of December in the year aforesaid, in due time and manner, did duly cause an appearance to be entered for him in the said court to the said writ, at the suit of the said plaintiff, in pursuance of and in obedience to the same writ, *as by the record and proceedings thereof remaining in the said County Court, at London, in the said United Counties, more fully appears.* And the defendant further saith, that the parties in this and the said former suit are the same, and not other or different persons, and that the said writ so issued on the said 22nd day of November, as aforesaid, was issued and prosecuted by the said plaintiff, *upon and for and in respect of the very same identical supposed trespasses in the said declaration in this present suit mentioned, and now pleaded to, the said supposed trespasses having been committed, and then and still being within the jurisdiction of the said County Court.* And the defendant further saith that the said plaintiff, after the said defendant had so appeared to the said writ so issued on the said 22nd day of November as aforesaid, and whilst the said County Court had full jurisdiction and authority in that behalf, and whilst the said suit was depending, to wit, on the 17th day of January, in the year of our Lord 1853, issued *a certain other writ of summons* out of the Court of Common Pleas of our said Lady the Queen, at Toronto, against, and directed to, the said defendant, as such sheriff as aforesaid, and whereby our said Lady the Queen commanded the said and now defendant that within eight days after the service of that writ on the defendant he should cause an appearance to be entered for him in the said Court of Common Pleas at Toronto, by filing his appearance in the office of the Deputy Clerk of the Crown of the said Court, in the United Counties of Middlesex and Elgin, in an action of trespass, at the suit of the said plaintiff, and the said defendant duly caused an appearance to be entered for him in the said court, to the said last mentioned writ in pursuance and obedience to the same, as aforesaid; and thereupon the plaintiff declared thereon, and upon and for and

in respect of the same identical supposed trespassers, *as aforesaid*. And the said defendant further saith, that the said former writ and action so issued and prosecuted against him the said defendant by the plaintiff as aforesaid, is still depending in the said County Court of the United Counties of Middlesex and Elgin; and the supposed trespasses, in respect of which the *said former writ was issued*, then and still being and committed within the jurisdiction of the said County Court; and this the defendant is ready to verify: wherefore he prays judgment of the *said writ* in this suit, and the declaration thereon founded, now pleaded to, and that the same may be quashed.

Demurrer.—Causes of demurrer:—First, that the pendency of an action in an inferior court cannot be pleaded to an action in a superior court. Secondly, that if the defendant relies on the inferior court being a Court of Record, he ought to have averred that it is a Court of Record. Thirdly, that it is not sufficient to plead that the matters are within the jurisdiction of an inferior court, but the nature of the jurisdiction ought to have been stated, and it ought to be stated also how such court was established, and how it obtained its jurisdiction, in order that the plaintiff might take a traverse thereon. Fourthly, that the superior courts cannot take judicial cognizance of there being such a court as the County Court of the United Counties of Middlesex and Elgin, and that the plea does not sufficiently inform the court of the legal existence of such a court as the said County Court. Fifthly, that it ought to be stated whether the said County Court is the court of our Lady the Queen, or whose court it is. Sixthly, that the action is still depending. Seventhly, that the defendant does not state that the plaintiff issued the said writ in the Court before the commencement of this suit, but merely before the issuing the writ in this action, or the plaintiff's declaring thereupon. Eighthly, that it is not alleged that the plaintiff impeached the defendant in the said County Court suit. And, ninthly, that the said plea is double and bad in this, that it sets forth the pendency of two actions other

than the present one for the same causes, and is otherwise informal and bad.

Beecher, for the demurrer, contended the pendency of the action in the County Court was not plea~~able~~ to the action in this court—the County Court being an inferior court, though created by statute and presided over by a judge appointed by the Queen, under the great seal of Canada—*Laughton v. Taylor*, 6 M. & W. 696; *Esdaille et al. v. Lund*, 12 M. & W. 607.

He relied on the several grounds of demurrer specially assigned, particularly duplicity, or ambiguity in the uncertainty on the face of the plea, whether defendant intended to plead the pendency of two other actions, one in the County Court and another in this court, in abatement of the present action, or only the former.

Richards, for plaintiff, submitted that the County Court was not an inferior court in that sense which precluded the defendant from pleading the pendency of a prior action in that court in abatement of an action for the same trespass to the plaintiff's goods in this court: that the County Court was a court of Her Majesty, created by statute, held by judges commissioned by the Queen, in which the proceedings were conducted in her name, and the jurisdiction of which was, up to a certain amount and in certain specified causes of action, concurrent with this court: that issues may be sent from this court to be tried there, and that the judge thereof has authority to do other acts in relation to suits instituted and pending in this court: that superior courts are said to be principal and less principal—Bac. Ab. "Courts" D; and that the County Court was of the latter description—at all events, not an inferior court, proceeding as it does by the course of the common law—a system of pleading similar to this court: and trial by jury, with right of appeal to this court upon any matter final, or interlocutory decided in the course of the cause: that the plea was not double—the writ stated to have issued in this court being the writ, &c., in this cause, as shewn by the words "*as aforesaid*," at the end of the allegation.

The following authorities were referred to:—Bac. Ab. "Courts" D., 1b "Abatement," K; *Sparry's case*, 5 Co. 61;

Mitchell v. King, Barnardist 143; Seers v. Turner, 2 Ld. Rayd. 1108; Brinsby v. Gold, 12 Mod. 204; Dudfield v. Warden, Fitz. 313; White v. Willis, 2 Wil. 87; Com. Dig. "Abatement," ~~2~~ 24, No. 9; Rawlinson v. Oriet et al., Holt 1; Brook v. Smith, ib. 285; Moyle v. West et al., 1 Dyer, 92-3; Kerby v. Siggers et al., 2 Dow. P. C. 659; Bac. Ab. "Abatement" M; 3 Ch. Plg. Forms, note a; Rowland v. Veale et al., Cow. 18; Hixon v. Binns, 3 T. R. 185; Marsh v. Burns, 1 U. C. C. P. 334; Nash v. Calder, 5 C. B. 513; Byrne v. Knipe, 5 D. & L. 659, 12 Jur. 1075, S. C.; Reg. v. The Mayor and Aldermen of London, 11 Jur. 867; Winson v. Dunford, 12 Jur. 729; Levy v. Moylan et al., 10 C. B. 189; Owens v. Breese, 6 Ex. R. 916; Rees v. Williams, 7 Ib. 51; Peacock v. Bell et al., 1 Saund. 73; Brookman v. Wenham, 15 Jur. 249.

MACAULAY, C. J.—The plea appears to me bad—admitting that the pendency of the action in the County Court might be pleaded in abatement—on two grounds.

1st. It does not aver that the defendant was impleaded, or that the plaintiff has declared in the County Court, or that the identity of the two causes of action appears by the record. It merely alleges that the defendant was served with and appeared to a writ issued out of that court, at the plaintiff's suit in trespass, as appears by the record, and then alleges as a matter of fact to be tried *aliunde* that the causes of action are identical. Had the plea averred that the identity appeared by the record, and the plaintiff taken issue, the case of Mitchell v. King, 2 Barnardist 143, is express that the defendant would fail upon the production merely of a writ in trespass generally. The case of Kerby v. Siggers et al., 2 Dow. P. C. 659, may conflict with this; but Sparry's case, 5 Co. 61, Dudfield v. Warden, Fitz. 313, and others referred to, seem to me to shew that the mere statement of a writ in trespass not shewn to be explained or amplified by a declaration is not sufficiently certain to support a plea in abatement of another action pending for the same identical trespass as that alleged in a declaration for trespass to a specific chattel. The general writ does not import it on the face of it. It cannot be inferred

as a legal presumption of fact; nor is it susceptible of proof upon issue taken upon *multiel record*, nor do I see that it could be proved without more as a fact by evidence before a jury.

2nd. The plea is double or fatally ambiguous. In this respect it much resembles the case of *March v. Burns*, 1 U. C. C. P. 334, which is quite in point in support of the demurrer on this ground of exception. The words, "*as aforesaid*," do not cure the objections by reference to the antecedent. It rather refers to the same identical supposed trespasses for which the writ was issued in the County Court than to those mentioned in the declaration in this cause, as the subsequent use of the same words, "*as aforesaid*," a little further on in the plea, tend to shew,—at all events, they are fatally uncertain in a matter requiring unequivocal precision—*Gore v. Lloyd*, 12 M. & W. 464—See per *Pollock B.*, in *Bleakley v. Jay*.

The plea is evidently framed upon the form in 3 Ch. Plg., 7 edn. p. 19, which in the note is shown to have been approved of in a case of *Abbott & another v. Raphail & another*, in June 1835. I can find no report of such a case, nor am I satisfied of the correctness of the plea as there given, nor do I find any resembling it in other books of precedents that I have had access to.

As respects the main question; if the plaintiff had declared in the County Court for a trespass to a mare of his, as he has done in this action, and that suit was still pending, I am not prepared to say the pendency of such suit might not be pleaded in abatement. The reasons in support of such a plea are very forcible; and I am more inclined to deem it admissible than to hold the County Courts (constituted as ours are, and possessing the jurisdiction and powers conferred upon them,) inferior courts in that sense which would enable a plaintiff to bring a suit in this court after having proceeded to a declaration in that for the same indential cause of action, without previously discontinuing. All the arguments of co-ordinate jurisdiction *quoad* the subject matter, and of the harassing vexation of a second suit in a superior court pending such action, &c., apply with perhaps unanswerable force.

McLEAN, J., concurred.

Per Cur.—Judgment for demurrer.

WALKER & HUTCHINSON v HAWKE.

Replication de injuria.

Assumpsit on a promissory note made by defendant payable to plaintiffs.

Plea, no consideration—in that the note was given for the debt of a third party not yet due. Replication, *de injuria*.

Held, replication good, the plea being in excuse.

Quære: the sufficiency of the plea as given in the report.

Appeal from the County Court of the United Counties of York Ontario and Peel.

ASSUMPSIT, on a promissory note by payees against maker.

Declaration—for that the defendant, on the twelfth day of August, in the year of our Lord one thousand eight hundred and fifty-two, made his promissory note in writing, and delivered the same to the plaintiffs, and thereby promised to pay to the plaintiffs under the name and style of Walker and Hutchinson, at the Bank of Montreal at Toronto, the sum of thirty three pounds three shillings and six-pence of lawful money of Canada three months after the date thereof, which period had elapsed before the commencement of this suit ; yet the defendant hath not paid &c.,

Third plea,—The defendant saith that one George M. Hawke before the making of the said promissory note, and before the commencement of this suit, to wit, on the first day of August 1852, was indebted to the plaintiffs in the sum of thirty-three pounds three shillings and six-pence, for goods sold and delivered by the plaintiffs to him, which money was to be paid by the said George M. Hawke to the plaintiffs within six months thereafter, and that at the time of the making of the said promissory note the said George M. Hawke was, and stood indebted to the plaintiffs in the said sum of thirty-three pounds three shillings and six-pence, payable as aforesaid ; and the defendant further saith that the said plaintiffs, after the said George M. Hawke became so indebted as aforesaid, and before the making of the said promissory note, applied to the defendant for payment of the said sum of thirty-three pounds three shillings and six-pence, when, to wit, on the said twelfth day of August 1852, in compliance with the plaintiffs' request, he the defendant, in respect of the said George M. Hawke being so indebted to the plaintiffs as aforesaid, and for no other

consideration whatever, therein made and delivered the said promissory note in the said declaration mentioned to the plaintiffs, and the defendant avers that the said promissory note became due and payable before the said sum of money in which the said George M. Hawke was so indebted to the plaintiffs as aforesaid was payable, to wit, on the 18th day of November in the year aforesaid; and that there never was any consideration for the making of the said note by the defendant on the plaintiffs except as aforesaid: verification.

Replication to the third plea, *de injuria*.

Demurrer to the replication of the plaintiffs to the third plea of the defendant, for the following causes: that is to say, that the said plea avers matters whereby the making of the said note was absolutely void at the time of the making thereof and could not be enforced, and a want of consideration between the parties, without any benefit or advantage arising or accruing to the third party therein named, and without his privity or consent, and that the time for payment of the alleged debt therein mentioned had not arrived at the time of the commencement of this suit; and the plaintiffs, instead of traversing some one or more material allegations in the plea, set forth generally replies *de injuria* to the whole, and for that the form of replication is inapplicable, as the said plea is not pleaded in excuse of the non-performance of the promise in the declaration mentioned, but in avoidance of it; and for that the said replication is multifarious and tenders too large an issue, and should have expressly denied or admitted the substantial allegations in the plea mentioned and concluded with a spécial traverse; and for that the said replication is in other respects informal and insufficient.

Joinder in demurrer by plaintiffs, as to their replication to the third plea.

Judgment for plaintiff on both demurrers in the court below.

Dempsey, for the appellant (Hawke), cited *McGillivray v. Keefer*, 4 U. C. R. 456, to shew that want of consideration was a valid defence by the maker of a promissory note given spontaneously and without request for the debt of

third person, a stranger, not in privity with such maker. He also cited *Jones v. Ashburnham*, 4 East, 455; *Petch v. Lyon*, 9 Q. B. 147; *Serle v. Waterworth*, 4 M. & W. 9; *Nelson et ux. v. Serle*, 4 M. & W. 795; and *Dickinson v. Clemow*, 7 U. C. R. 421.

He also contended that the plea was in denial, and not in excuse—citing *Southall v. Rigg*, 20 L. J. C. P. (N. S.) 145; *Forman v. Wright*, *Ib.* 148.

McMichael, in reply, referred to *Marston v. Allen*, 8 M. & W. 494; *Cowper v. Garbett*, 13 M. & W. 33; *MacFarlane v. Keezar et al.*, 5 U. C. R. 580; *Scott et al. v. Chappellow*, 4 M. & G. 336; *Rattray v. McDonald et al.*, 3 U. C. R. 355; *Griffin v. Yates*, 2 Bing. N. S. 579; *Isaac v. Farrar*, 1 M. & W. 65; *Watson v. Wilks*, 5 A. & E. 237; *Reynolds v. Blackburn et al.*, 7 A. & E. 161.

As to the plea in substance, the following cases—*Dickenson v. Clemow*, 7 U. C. R. 421; *Tyr. Pleading "replication de injuria,"* 600 to 619; *Ib.*, 357 to 361; *Isaac v. Farrar*, 1 M. & W. 65; *Muttlebury v. Hornby*, 6 U. C. R. 61; *Robinson v. Little*, 9 Q. B. 602; *Laforest v. Wall*, *Ib.* 599; *Herbert v. Sayer*, 5 Q. B. 965.

MACAULAY, C. J.—The plea appears to me to be clearly in excuse; it sets up the want of consideration, and states why or how there was no consideration. But *prima facie*, the note is good, and the promise binding. The defendant excuses performance of it by showing the want of any legal or valid consideration.

There are many cases in the books where *de injuria* has been replied to pleas of this description.

The effect, if traversed, would be to bind the defendant to proof of his plea by showing the want of consideration for the reason assigned therein.

As to the sufficiency of the plea, the judge below gave no opinion upon it, nor was it necessary for him to do so, as the plaintiff prevailed upon the demurrer to his replication. There is therefore no ground for appeal from any judgment of the court below upon the validity of the plea.

If necessary to decide upon it, I am disposed to think it good in substance, as showing the want of any valuable or binding consideration for the note.—*Price v. Easton* (4. B.

& Adol. 433, and cases there cited), *Crow v. Rogers*, (1 Stra. 592;) *Nelson et ux. v. Serle* (4 M. & W., 795), *Serle v. Waterworth* (Ib. 9), *Barber v. Fox* (2 Saund. 137).

McLEAN, J., concurred.

Per Cur.—Judgment for respondents.

R. DEMPSEY & ANOTHER V. D. G. MILLER.

Special Assumpsit—Indorser v. Co-Indorser of a note unpaid, for contribution by express contract.

Special assumpsit by one of several indorsers against defendant, a co-indorser of a promissory note made by one A. B., and indorsed by all the parties, to enable A. B. to discount it at a bank. The declaration set forth that A. B. made his note payable to G. L. A. at the Bank U. C.; and that it was thereupon agreed by and between said defendant and said plaintiff and the said G. L. A. and the other indorsers (naming them) that if plaintiff and the other parties would indorse said note, and the indorsers should become liable to pay the same, then that defendant would pay to the holder thereof such sum of money as upon an equal division of the whole amount would be his share. Then it averred indorsement by plaintiff—non-payment of the note—non-performance by defendant of his promise, and that plaintiff was thereby forced to pay £30, &c. *Held*, on special demurrer to the declaration: 1st, that a sufficient consideration appears; 2nd, but that it does not appear plaintiff paid more than his share—or that the other parties had not paid the residue—or that defendant had not paid all the parties but the plaintiff the portions of his share to which they were entitled.

ASSUMPSIT. *Declaration*—For that whereas heretofore, to wit on, &c., one Alexander McClenaghan made his certain promissory note in writing, and thereby promised to pay to one George L. Allen or order forty pounds currency, to wit, lawful money of Canada, ninety days after the date thereof, at the Bank of Upper Canada; and it was thereupon afterwards (to wit on the same day and year aforesaid) agreed by and between the said defendant and the said plaintiff Richard Dempsey and the said George L. Allen, and one John Kidd, and one William Henry Boulton, that in consideration that he the said Richard Dempsey should, for himself and the said other plaintiff John William Dempsey, but in his the said Richard Dempsey's own name, and they the said George L. Allen, John Kidd and William Henry Boulton severally, should endorse the said promissory note for the purpose, and that the said note should be discounted at a certain bank, to wit the said Bank of Upper Canada, for the use and benefit of the said Alexander McClenaghan; and

that in case it should happen that the said Alexander McClenaghan should not pay the amount of the said note when the same should become due and payable according to its tenor, and that the said Richard Dempsey for himself and the said other plaintiff jointly, and the said George L. Allen, John Kidd and William Henry Boulton, should become liable to pay the monies due on the said note to the holder or holders thereof; that he the said defendant would provide for, contribute to pay, and would pay such sum of money in discharge and liquidation of the monies due and payable on the said promissory note to the holder or holders thereof, as would upon an equal division of the whole amount thereof become and be his share and proportion of the same; and further, that the defendant would indemnify and save harmless the said plaintiffs from any loss or damage for or by reason of the indorsement of the said promissory note by the said plaintiffs, in manner and form as aforesaid, in so far as the same related to the share and proportion of the monies due and payable on the said promissory note as aforesaid.

And the plaintiffs aver that they, confiding in the said promise of the said defendant, did afterwards, to wit, on the day and year first aforesaid, indorse the said promissory note by, and using the name of the said Richard Dempsey only, in manner and in pursuance and in fulfilment of the agreement aforesaid.

And although the said promissory note was afterwards, to wit, on the day and year first aforesaid, discounted for the use and benefit of the said Alexander McClenaghan, and although the said plaintiffs afterwards and before the commencement of this suit, to wit, on, &c., became liable to pay, were called upon and forced to pay, and did then pay unto the holders of the said promissory note, being the said Bank of Upper Canada, a large sum of money, to wit the sum of thirty pounds on account of the said promissory note, and the interest due thereon, as also a certain other large sum of money, to wit, the sum of forty pounds, as and for the costs of a certain action theretofore brought by the said Bank of Upper Canada against the said Alexander McClenaghan, George L. Allen the said defendant, Daniel

Gilbert Miller, Richard Dempsey, John Kidd and William Henry Boulton, for the recovery of the monies due on the said promissory note ; and although the said Alexander McClenaghan did not then pay and from thence hitherto hath not paid the amount of the monies due on the said promissory note, or the said costs, or any part thereof, to the said Bank of Upper Canada, or to the said plaintiffs, or to any person or persons on their behalf ; yet the said defendant, not regarding his said promise, did not nor would provide for, contribute to pay, or pay his share or proportion of the monies due and payable to the said Bank of Upper Canada, being the holders of the said promissory note, or indemnify or save harmless the said plaintiffs from any loss or damage, for or by reason of the indorsement of the said promissory note in manner and form as aforesaid, in so far as the same related to the share and proportion of the monies due and payable on the said promissory note as aforesaid, contrary to the said promise, but therein wholly failed and made default : by reason whereof, the said plaintiffs were heretofore and before the commencement of this suit, to wit, on the second day of January in the year last aforesaid, forced and obliged to pay a large sum of money, to wit, the sum of forty pounds, as and for the costs of a certain action heretofore brought in the Court of Queen's Bench for Upper Canada by the said Bank of Upper Canada, they being the holders of the said promissory note as aforesaid, for the recovery of the amount thereof against the said Alexander McClenaghan, George L. Allen, and the said defendant Daniel Gilbert Miller, the said Richard Dempsey, John Kidd and William Henry Boulton ; and thereby also the plaintiffs incurred and were put unto divers costs and expenses, to wit, to the amount of ten pounds, in and about the defending, settling and putting an end to the same suit, by means of which said several premises and of the said promise of the said defendant, the said defendant hath become and is liable to pay to the said plaintiffs a large sum of money, to wit, the sum of twenty-five pounds, being his share or proportion of the said amount of the said promissory note and the interest thereon, and of the costs, charges and expenses

as aforesaid; and the plaintiffs have been by means of the several premises aforesaid otherwise greatly injured and damnified.

Second count.—And whereas also the defendant, heretofore, to wit on, &c., in consideration that the said plaintiffs, by and using the name of the said plaintiff Richard Dempsey only, would indorse the said promissory note in the said first count mentioned, for the use and benefit of the said Alexander McClenaghan, the said defendant promised the said plaintiffs that in case the said Alexander McClenaghan should not pay the amount thereof when the same became due, and that the indorsers of the said note should be liable to pay the amount thereof, he the said defendant would provide for and pay his share or the proportion of the said note as would upon an equal division of the whole amount between the said indorsers be his share or proportion of the amount thereof.

And the plaintiffs aver that they, confiding in the promise of the said defendant, did afterwards, to wit, on the day and year aforesaid, indorse the said note by and using the name of the said plaintiff Richard Dempsey; and that, although the said Alexander McClenaghan did not pay the amount of the said note or any part thereof, and although the said plaintiffs were forced and obliged to pay a large sum of money, to wit, the sum of thirty pounds, on account of the said note and in part payment thereof, such sum, being more than the proportion of the amount of the said note payable by said plaintiffs under the agreement aforesaid; yet the said defendant, not regarding his said promise, did not nor would provide for or pay his share or proportion of the said promissory note, or any part thereof, according to the terms of the agreement aforesaid, but therein wholly failed and made default; whereby he the defendant hath become liable to pay to the said plaintiffs the said sum of thirty pounds, being his share or proportion of the amount of the said promissory note as aforesaid.

Common counts.—And whereas also the said defendant afterwards, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-two, was indebted to the said plaintiffs in the sum of one hundred

pounds, for the work, labour, care and diligence of the plaintiffs, by them the said plaintiffs before then done, performed and bestowed for the defendant as his agents, and upon his retainer and at his request, and for fees due and of right payable to the plaintiffs in that respect; and in and about the copying, drawing and engrossing of divers papers and writings for the said defendant at his request; and also for other work and labour, care, diligence and attendance of the plaintiffs by them then done, performed and bestowed for the defendant and at his request; and also for divers journies and attendances by the plaintiffs before then taken, made and performed for the defendant and at his like request.

And in one hundred pounds for money paid by the plaintiffs for the use of the defendant at his request, and for money had and received by the defendant for the use of the said plaintiffs.

And for money found to be due from the said defendant to the said plaintiffs, on an account stated between them.

And thereupon the defendant, in consideration of the said last mentioned several premises, promised the said plaintiffs to pay them the said several sums of money last mentioned, yet he hath not paid any or either of them, or any part thereof, to the plaintiffs damage of one hundred pounds, and therefore they bring their suit, &c.

Demurrer to the first and second counts, for the following causes, that is to say: 1st, That it is not shewn that there was any consideration for the defendant making the said alleged promise; and that it appears by the said first and second counts, that the said promissory note was indorsed by the said plaintiff Richard Dempsey for the benefit of the said Alexander McClenaghan, and that the said defendant had no interest therein whatsoever: 2nd, And that it is not averred, nor does it appear but that the whole amount of the said promissory note has been paid by some other of the said parties, George L. Allen, John Kidd or the said William H. Boulton; and that the said counts are in other various respects informal, uncertain and insufficient.

Non-assumpsit to remaining counts.

Joinder in demurrer as to the first and second counts.

The following cases were referred to in the argument and judgment :

Davies v. Humphreys, 6 M. & W. 168 ; Brittain v. Lloyd, 14 M. & W. 762 ; Asprey v. Levy, 16 Ib. 851 ; Osborne v. Rogers, 1 Saund. 264 and notes ; Lewis v. Campbell, 14 Jurist 396.

As to plaintiffs' joint right of action :—Crow v. Rogers, 1 Stra. 592 ; Goldie v. Maxwell, U. C. R., H. T., 4 Vic., (not printed) ; Annis et al. v. Lewis, Ib. Trin. Term, 6 & 7 Wm. IV. (not printed) ; Mason v. Ramsey et al., 1 Camp. 384 ; Siffkin v. Walker et al., 2 Ib. 308 ; Emly et al. v. Lye et al., 15 East. 7 ; Bank of South Carolina v. Case et al., 8 B. & C. 429 ; Byles on Bills, 31-33 ; — v. —, 1 Buck 100 ; Wintle et al. v. Crowther et al., 1 Tyr 210, 1 C. & J. 316 ; Furze v. Sharwood et al., 2 Q. B. 388 ; Trueman et al. v. Loder, 11 A. & E. 589 ; Brown on Actions, 116-7-8 ; Adams v. Thomas, 7 U. C. R. 249 ; Herbert v. Boulcott, 3 B. & P. 235 ; Graham et al. v. Robertson, 2 T. R. 292 ; Osborne et al. v. Harper, 5 East. 225 ; Chanter v. Leese et al., 4 M. & W. 295 ; 5 Ib., 698 S. C. ; Palmer v. Sparshott, 4 M. & G. 137 ; Lucas v. Beale, 20 L. J. C. P. 134, 4 Am. Eng. Rep. 358.

As to consideration :—Price v. Easton, 4 B. & Adol. 433 ; Kennedy v. Gouveia, 3 D. & R. 503 ; Wilson et al. v. Coupland et al., 5 B. & A. 228, and cases noted ib. ; Eastwood v. Kenyon, 11 A. & E. 428 ; Serle v. Waterworth, 4 M. & W. 9 ; Nelson et ux. v. Serle, Ib. 795 ; Petch et ux. v. Lyon, 9 Q. B. 147 ; Cocking v. Ward, 1 C. B. 870, note a ; Besant v. Cross, 10 C. B. 895 ; Webb v. Spicer, 13 Q. B. 886.

MACAULAY, C. J.—The only grounds of demurrer are :

1st, That no consideration is shewn for defendant's promise ; and that it appears by the first and second counts that the promissory note was indorsed by the plaintiff Richard Dempsey for the benefit of the maker, and that defendant had no interest therein whatever.

2nd, That it is not averred, nor does it appear but that the whole amount of the promissory note has been paid by some other of the parties, Allen, Kidd or Boulton.

1st, I think a sufficient consideration appears ; but, 2nd,

That it does not appear that the plaintiffs have paid more than their portion or share, or that the other parties than the defendant have not paid all the residue beyond their share, or that the defendant has not paid all the parties but the plaintiffs the portions of his share to which they may have been entitled. 3rd, Whether plaintiffs can sue jointly: first, for so much of defendant's share as they have paid; second, or for costs, without joining the other parties to the agreement and bank suit, as co-plaintiffs, especially as to the costs, unless averred to have been all paid by plaintiffs—are questions not raised on this demurrer nor necessary to be now decided.

McLEAN, J., concurred.

Per Cur.—Judgment for demurrer.

BENJAMIN GIBB, JAMES DUNCAN GIBB AND RAMON BEAUFIELD V. RICHARD DEMPSEY, JOHN W. DEMPSEY, EDWARD B. SMYTH AND DANIEL G. MILLER.

Action on promissory note—Indorsee v. Joint and several Makers and the Indorsers—Declaration.

Assumpsit on a promissory note. Declaration—"for that whereas the said defendants, R. D. and J. D., on, &c., made their promissory note, &c., and thereby jointly and severally promised to pay the defendant, E. S., or order the sum of, &c., and the said defendant E. S. then indorsed the same to the said defendant D. M., and the said defendant, D. M., then indorsed said note to the plaintiffs." Then followed averments of presentment non-payment, due notice and joint and several liability of *all* the defendants (R. D. and J. D., E. S. and D. M.); then it proceeded, "and being so liable, they *jointly and severally* promised to pay," &c. And there was no allegation of time to the averment of notice. *Held*, declaration good—there being no real inconsistency between the recital and promise, and the want of allegation of time being no ground of demurrer.

ASSUMPSIT.

Declaration.—For that whereas the said defendants Richard Dempsey and John W. Dempsey, on the tenth day of March, in the year of our Lord one thousand eight hundred and fifty-two, jointly and severally made their joint and several promissory note in writing, and thereby, for value received, jointly and severally promised to pay to the said defendant Edward B. Smyth, by and under the name of Edward B. Smyth, Esq., or order, the sum of twenty-nine pounds twelve shillings and seven pence, six months after

the date thereof, which period had elapsed before the commencement of this suit ; and the said defendant Edward B. Smyth, by and under the name of Edward B. Smyth, then indorsed said note and delivered the same so indorsed to the said defendant Daniel G. Miller, and the said defendant Daniel G. Miller then indorsed said note and delivered the same so indorsed to the plaintiffs, and the said defendants Richard Dempsey and John W. Dempsey did not, nor did either of them, pay the amount of said note to the plaintiffs, although the same was duly presented for payment on the day when the same became due, of all of which the said defendants Edward B. Smyth and Daniel G. Miller had due notice ; by reason whereof the said defendants Richard Dempsey, John W. Dempsey, Edward B. Smyth and Daniel G. Miller, became *jointly and severally* liable to pay the amount of said note to the plaintiffs, and being so liable afterwards *jointly and severally* promised the plaintiffs to pay them the same ; yet they have not, nor hath any or either of them paid the amount of said note or any part thereof, to the plaintiffs' damage of fifty pounds, and therefore they bring suit, &c.

Demurrer, for the following causes :—That the recital and promise in said declaration contained are inconsistent the one with the other, in this, that it is stated that the defendants Richard Dempsey and John W. Dempsey, named in said declaration and in manner stated thereby, made their promissory note, by which the said Richard Dempsey and John W. Dempsey, became jointly and severally liable to the said plaintiffs ; and the promise stated being a joint and several promise by all the defendants, whereas in fact the promise of the said Richard Dempsey and John W. Dempsey was a *joint and several* promise as between themselves only, and not a joint promise with the said other defendants, Edward B. Smyth and Daniel G. Miller ; neither are the said defendants Richard Dempsey and John W. Dempsey, as makers of the said promissory note, severally liable with the said other defendants, although true it is that they were *alone jointly* and each of them was, with the said other defendants, severally liable to pay the amount of the said note, and in

such form only could promise to pay the same. Further, that the allegation that all the said defendants became jointly and severally liable to pay the said note is inconsistent and contrary to law; and consequently, the promise set forth in said declaration is too large and repugnant to the facts alleged.

And, for that it is not stated in or by said declaration when or at what time the said defendants Edward B. Smyth and Daniel G. Miller had notice of the non-payment of the said promissory note.

Joinder in demurrer.

Dempsey, for the demurrer, referred to *Paterson v. Howison et al.*, 2 U. C. R. 139; *Bank of U. C. v. Gwynne*, 4 U. C. R. 145; *Nordheimer et al. v. O'Reiley et al.*, 6 U. C. R. 413; and contended the several liability alleged was not warranted by the statute or the cases cited, also that notice was not alleged with time.

Hallinan, for plaintiffs, contended that the promissory note declared upon being joint and several, and not joint, distinguished this from the cases cited. So that a liability jointly and severally was strictly correct—all the defendants being liable jointly and each separately—wherefore there was nothing in the first or main ground of objection; and that, as to time, the averment followed the new forms, and that time was included in the averment of due notice.

MACAULAY, C. J.—On referring to the 5 W. IV. c. 1, and 3 Vic. c. 8, sec. 2, the new rules (Cam. Rules, p. 50), and the preceding forms, in which are given forms of presentment and notice, &c., when necessary to be averred; and the cases cited of *Paterson v. Howison & McGan*, 2 U. C. R. 139: the *Bank of U. C. v. Gwynne et al.*, 4 Ib., 145: *Nordheimer et al. v. O'Reily et al.*, 6 Ib. 413, especially the two last, I think the declaration good. The defendants, makers of the note, being jointly and severally liable, and not joint makers only, distinguishes this case from the *B. U. C. v. Gwynne* (*supra*), and prevents the inconsistency objected to in that case arising. They are jointly and severally liable to the plaintiffs—either regarded separately or jointly with the other defendants.—If severally liable, regarded apart from the others, they do not cease to be so

because joined with them; and all the defendants being liable in this action, the makers are jointly as well as severally liable, together with the other parties to the note and action. The statute sanctions this form of declaring.

It may be said that the plaintiffs having sued the two makers jointly, could not recover against one only—but must succeed against both, or fail as to both; wherefore the liability in this action, in which both are joined, was joint and not several. But the statute requires all the makers to be joined, though one might have been otherwise sued severally;—and if severally liable, or liable to have been sued severally, the action under the statute is a joint and several action as well against the makers as the other parties to the note respectively.—*King et al. v. Hoare*, 13 M. & W. 494, 1b. 505.

As to the want of allegation of time when Smyth and Miller had notice of non-payment, it is no ground of demurrer on the part of the makers; and as to the indorsees, I think it sufficient, following, as the declaration does, the forms prescribed by the new rules in similar cases where the several parties are not jointly sued under the statute. If each indorser was sued alone the allegation would be sufficient, as being sanctioned by the forms given in the new rules; and I do not see that their being sued together under the statute makes any difference in this respect. It is virtually a several allegation as to each, though joint in form. I think, therefore, judgment should be against the demurrer.

McLEAN, J., concurred.

Per Cur.—Judgment for plaintiffs.

COCHRAN V. HISLOP.

District Councils—Power to sell growing timber on allowances for roads—Pleading.

The district councils had no power under 4 & 5 Vic. ch. 10 to pass a by-law authorizing the township councils to sell and dispose of trees growing upon the allowances for roads, &c.

A pleading alleging a purchase of such timber from the council ought to shew a transfer by deed or at least a contract or sale in writing.

TRESPASS. *Declaration*—“For that the defendant, on

the 1st day of December, in the year of our Lord 1852, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c., felled, cut down, prostrated, and destroyed the trees, to wit, 1,000 oak trees, 1,000 elm trees, 1,000 pine trees, 1,000 cedar trees, and 1,000 other trees of the plaintiff of great value, to wit, of the value of £200, then growing and being in the township of Whitby, in the said United Counties of York, Ontario, and Peel, and took and carried away the same, and converted and disposed thereof to his own use, and other wrongs to the plaintiff then did, against the peace of our Lady the Queen, &c.

1st plea.—Not guilty.

2nd plea.—Trees not the trees of the plaintiff.

3rd plea—"And for a further plea in this behalf, the defendant says that before the said time when, &c., and after the passing of a certain act of Parliament, passed in the twelfth year of the reign of Queen Victoria, intituled, 'An act to provide by one general law for the erection of municipal corporations and the establishment of regulations of police in and for the several counties, cities, towns, townships, and villages in Upper Canada,' to wit, on the 13th day of December, in the year of our Lord 1850, by a by-law passed by the Municipal Council of the township of Whitby, the timber on the road allowance between the fourth and fifth concessions of the said township of Whitby across lots Nos. 28 and 29, and between lots Nos. 28 and 29, from the front of the said fifth concession, back as far as a certain cedar swamp extends, was sold to him the defendant, the said timber being the same trees mentioned in the declaration; and the said defendant further saith that afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, the plaintiff purchased the said timber from certain persons who had no title to the same, whereupon the defendant at the said several times, when, &c., cut down and carried away the said trees and timber, as he lawfully might," &c.

Replication to 3rd plea.—"And the plaintiff to the third plea of the defendant says that after the passing of the act

in the fifth year of the reign of her Majesty chaptered ten, and intituled 'An act to provide for the better internal government of that part of this province which formerly constituted the Province of Upper Canada, by the establishment of local or municipal authorities therein,' and before the passing of the act in the said plea mentioned, to wit, on the 17th day of February, in the year of our Lord 1844, the then District Council of the then Home District, under and by virtue of the statute firstly in the replication mentioned, duly made and passed a by-law according to the same statute, whereby, after reciting that it was necessary to provide for the sale of stone, timber, sand, earth, and other materials that might be found standing or lying in or upon any highways or road allowances within the Home District, it was enacted, ordered, and declared by the said District Council that from and after the passing of the said by-law it should and might be lawful for the councillors in their respective townships within the said then District to sell or dispose of any stone, timber, sand, earth or any other material that might be found standing or lying in or upon any such highway or road allowance within their respective townships, as aforesaid, or upon any such highway as might thereafter be laid out within their respective townships, and that the proceeds of such sales should be paid over to the township clerk within the township where such proceeds should be raised; and the plaintiff says that after the making of the said by-law and before the passing of the statute in the said plea mentioned, to wit, on the 13th day of January, in the year of our Lord 1845, the councillors in and for the said township of Whitby—that is to say, Peter Perry and Abraham Farewell—under and by virtue of the by-law in this replication mentioned, did, for the consideration of 15s. of lawful money for each acre of the land herein mentioned, upon which the trees so sold and disposed of to the plaintiff stood, to be thereupon paid by the plaintiff to the township clerk of the township of Whitby, as aforesaid, sell and dispose of to the plaintiff the timber and trees then on the road allowance between the fourth and fifth concessions of the said township of Whitby,

and within the said township the whole of the lots Nos. 28 and 29, in the said fifth concession, whereupon the plaintiff, long before the passing of the statute in the said plea mentioned, and before the times when, &c., took possession of the said trees and timber and continued so possessed thereof until the said times when, &c. ; and the plaintiff says that the trees in the declaration mentioned are a part of the same trees sold and disposed of to the plaintiff as above in this replication mentioned, and this he is ready to verify," &c.

Demurrer to the replication.—The following causes of demurrer thereto, that is to say, that in the said replication the plaintiff sets up a title to the said trees and timber in the declaration mentioned as derived under and by virtue of the by-law in the said replication mentioned ; whereas in truth the act of Parliament therein referred to as passed in the fifth year of the reign of Her Majesty chaptered 10, authorized no such by-law as that there set out, nor had the then district councils any power under that act to pass by-laws for the disposal or sale of timber or trees upon the highways or road allowances within their municipalities, as in the said replication alleged : and 2nd, at any rate if they had such power themselves, they had not power to delegate their power to others, as by the said replication it appears they did as regards the then District Council of the then Home District ; and for that the said replication is in other respects uncertain, informal and insufficient.

Joinder in demurrer.

MACAULAY, C. J.—I have not been able to satisfy myself that the District Council had power under the 4 & 5 Vic. ch. 10, to pass a by-law authorizing the township councilors to sell and dispose of trees growing upon the allowances for roads, &c., so as to impart a vested interest and possession in such growing trees in their vendee. Such a sale, if authorised, might interfere materially with the public interests, if it gave the vendee a vested interest in the growing trees and in the soil as incidental. If not bound forthwith to cut down and remove them, these might be suffered to remain incumbering the allowances for roads indefinitely, and no obligation to remove them seems to have been

created here by the terms of the alleged sale ; for, though it took place, as alleged, before the passing of the 12 Vic. ch. 81, and as far back as the year 1845, the declaration represents the trees as still standing and growing when felled by the defendant under a by-law passed in the year 1850—the day of the trespass being laid, under a videlicet, the 1st of December, 1852. If such a sale could have been made to impart a vested interest in possession in the growing and standing trees, I apprehend the replication ought to have shewn a transfer by deed, or at least a contract or sale in writing, signed by the Council.—*Crosby v. Wadsworth*, 6 East. 602 ; *Glass v. Grubb*, 3 U. C. R. O. S. 611, 617 ; *Scorell v. Boxall et al.* 1 Y. & J. 396 ; *Smith v. Surman*, 9 B. & C. 561, 4 M. & R. 455 ; *Rodwell v. Phillips*, 9 M & W., 501 ; *Doe Hughes v. Jones*, lb. 372 ; *Carrington, v. Roots*, 2 lb. 248 ; *Dupa v. Mayo*, 1 Saund. 277 a (2) (e) ; *Case v. Barber*, L. Ray. 450, at the end ; *Teal v. Anty et al.*, 2 B. & B. 99 ; 4 Moore 542, S. C ; *Peacock v. Purvis*, 2 B. & B. 362 ; *Playfair v. Musgrove et al.*, 11 M. & W. 239 ; *Wilks v. Smith*, 10 M. & W. 360—as to the word “sold.”

McLEAN, J., concurred.

Per Cur.—Judgment for demurrer.

McLEAN v. KEZAR.

Construction of award—Finality—Certainty.

Two partners (plaintiff and defendant) having dissolved partnership, refer all disputes to the arbitrament of three persons named.—Bonds are executed to abide their final decision.

The award directed a certain sum to be paid by defendant to plaintiff, and then added that the same was “to be secured by such good security as may be requisite to save the said plaintiff harmless.” *Held*, award sufficiently final.

Held also, that the award directing that defendant should pay *all* debts due by the partnership was sufficiently certain without determining the amount for which defendant was to be responsible.

DEBT on bond—conditioned to perform and award.

The condition set out upon oyer recited that differences had arisen between the plaintiff and defendant, and, in order to put an end to them, they had agreed to refer the same to the award of three arbitrators therein named, and then proceeded—“Now the condition of this obligation is such that if the above bounden Alvin Kezar, his heirs, executors or administrators, shall and will in all things well

and truly stand to, obey, abide, perform, fulfil, and keep the award, order abitrament, and *final* determination of the said arbitrators, named to arbitrate of and concerning all the said differences, &c., and all manner of actions, &c., bills, bonds, specialties, judgments, promissory notes, orders, accounts whether partnership or otherwise, damages, trespasses, &c.; the award to be made and ready to be delivered on, &c.; then the bond to be void," &c.

Plea.—No award.

Replication set out the award, reciting the differences and bonds, and that the arbitrators having taken upon themselves the burden, &c., awarded payment by defendant to plaintiff of £315 3s. 6d. in three annual instalments—"the faithful payment thereof to be secured to the plaintiff by defendant by good and sufficient security within ten days from the date of the said award;" also, that the defendant should be accountable for all debts or monies due by the co-partnership, and should fully exonerate plaintiff from payment thereof by such good and sufficient security as might be requisite; also, that all outstanding accounts and monies due to the firm should be to the sole use of the defendant, except the debt of one James Dinning, which should be equally divided; also, costs of arbitration to be paid equally; also, that all suits, &c., should determine; also, that mutual releases be executed; and then the replication averred notice of the award to defendant, with assignment of breaches.

Rejoinder set out the award as in the replication, except as to the security for payment of the £315 3s. 6d., which was as follows: "the faithful payment thereof to be secured to the said Alexander McLean by the said Alvin Kazar by such good and sufficient security (*as will meet the approval of the said arbitrators*) within ten days from the date thereof, &c."; and again, as to the exoneration by defendant of plaintiff from debts due by the late co-partnership, "that he (defendant) shall fully exonerate the said Alexander McLean from the payment of such monies, debts, or liabilities aforesaid (*by such good and sufficient security as may be requisite to save the said Alexander McLean harmless, &c.*)

Demurrer to the sufficiency of the replication and award, for the following causes: that is to say, "that the said supposed award is not final between the said plaintiff and the said defendant, and is uncertain in this, that, in and by the said supposed award the arbitrators did award, order, decree, and adjudge that the said defendant or his heirs should pay or cause to be paid to the said plaintiff, his certain attorney, executors, administrators, or assigns, the sum of three hundred and fifteen pounds three shillings and six pence of lawful money of Canada, at the times and in the manner in the said supposed award set forth and specified in that behalf, and that the faithful payment thereof should be secured to the said plaintiff by such good and sufficient security as would meet the approval of the said arbitrators within ten days from the date of the said supposed award, whereby the said arbitrators did reserve to themselves a further power to act in the matter of the said security, after the making of the said supposed award, and after the last day for their making the same, to wit, &c., had passed, and did not finally and certainly determine, by the said supposed award between the said parties, *what security* should be given by the said defendant to the plaintiff, as the said arbitrators should have done, to render the said supposed award final and certain. 2nd. And also, that the said arbitrators did, by directing in the said supposed award that the defendant should give such security, exceed the authority given to them in and by the aforesaid bonds of submission executed by the defendant. 3rd. And also, that the said supposed award is not final between the said parties and is uncertain in this, that the said arbitrators did in and by the said supposed award, award, order, decree, and adjudge that the said defendant should become solely accountable for all monies, debts, or liabilities due and owing by or accruing from the said co-partnership, and be individually responsible for the same without setting out in, and determining and deciding finally and certainly, by the said supposed award, the amount and nature of the said monies, debts, and liabilities, and to whom the same were due, whereby the said supposed award is uncertain and

not final. 4th. And also, that the said supposed award is uncertain and not final between the plaintiff and defendant in this; that the said arbitrators did thereby award, order, decree, and adjudge that the said defendant should fully exonerate the said plaintiff from payment of such monies, debts, and liabilities aforesaid, by such good and sufficient security as might be requisite to save the said plaintiff harmless, without deciding by the said supposed award finally and certainly what security should be given by the said defendant to the plaintiff; or what security would be good and sufficient to save the said plaintiff harmless; or how or by whom the goodness and sufficiency of the said security was to be ascertained and decided; or what amount of good and sufficient security would be requisite to save the said plaintiff harmless in the premises. 5th. And also, that the said supposed award is uncertain and not final between the parties, in awarding that the said defendant should fully exonerate the said plaintiff from the payment of all monies, debts, or liabilities due and owing by, or accruing from, the said co-partnership, by such good and sufficient security as might be requisite to save the plaintiff harmless, without ascertaining and deciding finally and certainly in and by the said supposed award the exact amount of the said monies, debts, and liabilities, and the exact amount of security requisite to save the plaintiff harmless, thereby leaving the amount of the said monies, debts, and liabilities, and the amount, nature and kind of security requisite, wholly uncertain and undecided in and by the said supposed award. 6th. And also, that the said arbitrators have exceeded the authority given them in and by the said submission bond of the said defendant, by directing and awarding that the defendant should give security to the plaintiff for the payment of the said last mentioned monies, debts, and liabilities. 7th. And also, that the said supposed award is inconsistent and uncertain in this, that the said arbitrators did thereby award, order, decree, and adjudge that a certain debt therein mentioned, due and owing from and by one James Dinning therein mentioned to the said plaintiff and the said defendant,

should be equally divided between the said plaintiff and defendant, in the event of the same or any part thereof being paid to the said plaintiff, his certain attorney, administrators, executors, or assigns, for the faithful payment whereof the said plaintiff, his heirs, administrators, or assigns are held responsible. 8th. And did also thereby award that the defendant should become solely accountable for all monies, debts, or liabilities due and owing by, or accruing from the said co-partnership, and be *individually* held responsible for the same, and fully exonerate the plaintiff from the payment of the same. 9th. And did afterwards thereby award that the said parties should within the space of ten days next ensuing the date of the said supposed award execute unto each other mutual and general releases of all actions, cause and causes of actions, suits, controversies, trespasses, debts, duties, damages, accounts, whether partnership or otherwise, reckonings and demands whatsoever, from the beginning of the world to the day of the date of the said bonds of arbitration, whereby the plaintiff and defendant would mutually release each other from liability to each other on account of the said demands and monies, debts and liabilities, which in the former parts of the said supposed award, as lastly above set forth, they were thereby respectively directed to pay; and also, for that the said replication and the said supposed award are in other respects uncertain, informal, and insufficient, &c.

Joinder in demurrer.

Vankoughnet, Q. C., for plaintiff, observed that the defendant (after pleading no award, to which the plaintiff replied an award), had irregularly set out what he alleged to be the award in *hæc verba*, and then demurred. But, waiving objection on this ground, he contended the award was valid. That, however it might have been had the security been material, it was not so in this case, there being an express award in plaintiff's favor, and payment of the sum awarded duly directed; and that the superaddition of a direction that the defendant should not vitiate the previous part of the award, which was

sufficient in itself; and that the unauthorized addition being in plaintiff's favor might be waived, if not (as it was) nugatory in itself. That being so, it was in relief of the defendant, not prejudicial to him; and, therefore, unimportant as a defence or objection to the award on his part. He cited *Simmonds v. Swaine*, 1 Taunt. 548; *Cooke v. Whorwood*, 3 Saund. 337; *Thursey v. Halburt*, 1 Show. 82, 3 Mod. 272, Cart. 159, S. C.; *Bean v. Newburry*, 1 Lev. 140; *Nicolls v. Jones*, 6 Ex. R. 373.

Also, that there was an excess of authority, if well done; but not being well done, it was simply void *pro tanto* only.—*Brown v. Watson*, 6 Bing., N. S. 119.

That it was not necessary to state the amount of liability to be borne by defendant, it being general of all debts, &c., and no uncertainty therein, or dispute respecting the same being alleged.—*Wood v. Wilson*, 2 C. M. & R. 241; *Ex parte Coppard et al.*, 4 Dea. & Ch. 102; *Wilkinson v. Page*, 1 Hare 276.

That the award of mutual releases could not affect the validity of the award—*Ames et al. v. Milward*, 8 Taunt. 697; *Marks v. Marriot*, 1 Lord Ray. 114, 533; *Squire v. Grevett*, 2 Ib. 961; *Bac. Ab.* "Arbitrament and Award," E. 1; *Wood v. Adcock*, 7 Ex. R. 468, 9 Am. Eng. Rep. 524, S. C.

Brough, for defendant, referred—1st. as to arbitrators reserving to themselves a power to settle the security—*Rolle's Ab. Arbt. H.* 4, p. 250; *Hunter v. Bennison*, *Hard.* 43, (both of these cited in *Russell on Arbitration*, ed. 1849, p. 275, at the end.)

2nd. As to the alleged uncertainty in this respect, that the award does not determine the amount of the partnership liabilities for which defendant is to become responsible, and against which he is to indemnify plaintiff, and uncertainty as to amount of *Dinning's* debt—*Hewitt v. Hewitt*, 1 Q. B. 110; *In re Marshall v. Duper*, 3 Q. B. 878: and, as to the arbitrators' authority to order indemnity—*Ross v. Bourds*, 8 A. & E. 290.

3rd. As to the nature of the security not being specified whereby defendant was to secure plaintiff in the payment

of two instalments of the sum of £315 3s. 6d. ; and whereby defendant was to indemnify plaintiff from the partnership liabilities—*Tipping v. Smith*, 2 Stra. 1024 ; *Thinne v. Rigby*, Cro. Jac. 314.

MACAULAY, C. J.—On reference to the cases cited, I think judgment should be against the demurrer.

1st. If it was the plaintiff's interest to object to the direction as to security, it might be material, but it does not invalidate the award in his favor, which, in the first place, unconditionally directs the payment of the money to him ; they are clearly separable—*Cooke v. Whorwood* (3 Saund. 337), *Brown v. Watson* (6 Bing. N. S. 118).

2nd. I do not think it necessary that the award should determine the amount of the partnership liabilities for which defendant was to become responsible, being all debts except *Dinning's*.

3rd. As to *Dinning's* debt, the cases cited bear some resemblance to it ; but when compared, are not in point. The present award is entirely prospective. It throws all the losses sustained by *Dinning's* failure upon the plaintiff exclusively ; and directed that the said debt shall be equally divided between the parties (plaintiff and defendant) "*in the event of the same, or any part thereof being paid* to plaintiff, for the faithful and prompt payment whereof the said plaintiff was thereby held responsible. This means that if any part of it should be afterwards paid to plaintiff, he should faithfully and promptly pay the defendant a moiety of whatever he might receive.

The case of *Dresser v. Stansfield* (14 M. & W. 822) is debt on an award, and is inapplicable to this case, upon the objection made.

The causes suggested in the notice would have been clearly bad on the plaintiff's part.

This action is debt on bond ; defendant craves oyer of the condition, and pleads no award ; the plaintiff replies, alleging and setting out an award ; the defendant demurs on the ground that the award stated is invalid, and so no award. The plaintiff could not in his replication have traversed a plea *denying* any award. See 2 Stra. 1024,

Cro. Jac. 314, 2 Bul. 260, 12 Mod. 533, 5 A. & E. 147, Russell on Awards 325.

McLEAN, J., concurred.

Per Cur.—Judgment for plaintiff.

THE QUEEN EX REL. THE ATTORNEY GENERAL V. HIBBARD.

Customs—Information—Pleading.

Information for the condemnation of goods seized as forfeited for breach of the customs laws. 2nd count set forth that the goods were entered with the proper officer of customs—that in such entry they were valued at £. s. d., and that the said goods were in and by such entry so made as aforesaid *undervalued* (not pointing out whether in reference to the domestic or foreign market value), with intent to avoid payment of duty, &c.

Held, on motion in arrest of judgment, 2nd count sufficient after verdict (The Queen v. Brunskill, 8 U. C. R., 546, upheld.)

INFORMATION for the condemnation of goods seized as forfeited.

1st count was against persons unknown for importing in a boat or vessel, into the city of Toronto, from the United States of America 59 cases of Indian rubber shoes, liable to duties, and landing the same before entry, &c.

2nd count stated that persons unknown did between the 1st of January 1850, and the 1st of December 1852, import by way of merchandise, from the United States of America into the port of Toronto, in Upper Canada, in a boat or vessel, 59 cases of Indian rubber shoes, &c., consisting of women's buskins and men's over-shoes, &c., of the value of £440, the same being liable to the payment of customs at an *ad valorem* duty; and that the said persons did make entry inwards of the said goods for payment of duties at the custom-house in the city of Toronto aforesaid, with Meudell, the collector, which entry of the value of the said goods for duty was stated to be £300 2s. 6d., and that the said goods were in and by such entry so made as aforesaid *undervalued, with intent to avoid the payment of the duty, or of some part thereof, on such goods, &c.*, contrary to the form of the statute in such case made and provided; whereby and by force of the statute they became liable to forfeiture, and were forfeited, &c.: wherefore the said collector (Meudell) seized the same as forfeited, &c.

The defendant appeared and claimed the property of the said goods to belong to him, and protesting that the said information was insufficient in law, &c., pleaded :

1. To first count, that the said goods therein mentioned were not unladen before due entry thereof, &c.

2. To the 2nd count, that the said goods therein mentioned were not, nor was any part thereof in by the entry therein mentioned *undervalued with intent to avoid the payment of duty*, or of any part thereof, on said last mentioned goods, in manner and form as in the said 2nd count alleged.

Both pleas concluded to the country, and issues joined thereon.

The case was tried before Macaulay, C. J. C. P., at the last (Toronto) assizes, when a verdict was rendered for the Crown.

In the last Term, *Hallinan*, counsel for the defendant, obtained a rule upon the Attorney-General to shew cause why the verdict should not be set aside and a new trial had, on the grounds :

1st. That it was contrary to law and evidence, and to the weight of evidence.

2nd. Of surprise, as shewn by the affidavit filed. Or,

3rd. Why judgment should not be arrested, or a new trial be ordered, on the grounds that the 2nd count was bad in law ; because,

1st. It did not state whether the undervaluation complained of therein relate to the value of the goods therein mentioned in the country where they were purchased, or the country into which they were imported.

2nd. It did not disclose or state whether the said undervaluation was such an undervaluation as the law declared to be cause of forfeiture.

3rd. That the 2nd count was framed under a particular statute, and yet did not shew that the collector of customs for Toronto complied with the requirements of said statute before seizing said goods.

4th. That the duties required of the collector by law are compulsory, and must be performed before any goods could be declared forfeited, and yet the said count did not shew any performance thereof.

5th. It did not shew that the said collector took the means prescribed by law to find the value of the said goods before he declared the same forfeited.

6th. The same objection as the three last in general terms.

It was in evidence on the part of the Crown, that on the 30th of November last the steamer *Marion* arrived at this port, and that on the 3rd December 1852 Mr. Blachford, a clerk of Messrs. Brown and Childs, of the city of Toronto, merchants, produced to the collector of customs in the port of Toronto an invoice of 59 cases of Indian rubber shoes, also an entry paper with a view to the payment of an *ad valorem* duty of $12\frac{1}{2}$ per cent upon the value thereof.

The invoice was headed—"Invoice, 59 cases 2nd quality Rubber Shoes, consigned by E. M. Chaffey & Co. to Messrs. Brown & Childs, of Toronto. Providence, 17th November 1852. 1 to 20 Women's Buskins, 1000 pairs, and 21, 24, 50, 57, 59—in all 2,000 pairs at 35 cts.: \$700—residue, 910 pairs Men's, 55 cts.: \$500 50c.—In all, \$1200 50c. Mark B. & C., Toronto, Canada. Rutland Burlington & Ogdensburgh R. R.—No. 1 to 59. Signed, E. M. Chaffey & Co., per A. Hibbard."

The entry paper was dated 3rd December 1852, as imported by Brown & Childs per steamer *Marion* from Ogdensburgh—59 cases rubber over-shoes; value in currency, £300 2s. 6d.; rate of duty, $12\frac{1}{2}$ per cent.; amount of duty in currency, £37 11s. 4d.

That the collector, not being satisfied with the value placed upon the goods, asked for correspondence. It was at first said there was none; but afterwards, at an interview between the collector and the professional attorney of Brown, a letter was shewn to him addressed to Champion Brown, Esq., Toronto, dated Montreal, 20th November 1852, from the defendant, signed A. Hibbard, as follows:—"Enclosed I hand your invoice of 59 cases shipped to you from Providence, on the 17th inst. Messrs. Chaffey & Co. write that they will send you the whole lot you ordered within ten days. I hope they will come to hand soon and in time. I send you the enclosed invoice, which is all you require for

custom-house entry. As soon as you receive them, please send in a statement of charges (duties and freight), in order that I may credit you the amount, as they will be charged you same as heretofore. (a) Do not neglect this." The appraiser and several other witnesses, dealers in such articles in Toronto, and one witness, an extensive wholesale dealer in Buffalo, were then called and gave evidence with a view to prove that the goods were valued materially under the cash value in the markets of Buffalo, New York, Boston and Providence, &c.

In answer to which the defendant called several witnesses—one a manufacturer of India rubber shoes formerly near Boston, at present of Montreal—to shew that shoes of the quality and description in question were not placed below their cash value in the markets in question.

There was a great deal of evidence on both sides upon this subject; and it was in the end left to the jury to find for the Crown, or the defendant, according as they were satisfied, and should decide that the goods were entered below their actual cash value in the principal markets in the country where purchased and whence imported from; and they found for the Crown.

Richards, for the Crown, shewed cause against the defendant's rule during the same term, and contended—

1. That the only affidavit filed of Johnson Briggs did not shew surprise: that he therein stated having in the month of February last offered, as agent of defendant, to sell to one of the witnesses on behalf of the Crown (Tyner) Indian rubber shoes of the same kind, quality, and description as those in question, at 2s. 6d. for women's and 3s. 4d. for men's shoes, and that Tyner said he considered shoes purchased by him at Buffalo at 3s. 6d. for women's, and 4s. 6d. for men's shoes cheaper and more saleable goods than those offered by deponent; also, that he did with Tyner try and test the said goods, and both pronounced them second-rate articles.

It is proper here to remark that the said Briggs was called as a witness on behalf of the Crown merely to

(a) But what that price was, or the price delivered was not explained at the trial.

prove the defendant's handwriting to the letter dated Montreal, 20th November 1852, and another dated Montreal, 10th December 1852; that on cross-examination the Chief Justice allowed anything in favor of the defence to be elicited; that he, however, rejected proof by this witness that after the seizure of the goods in question he had as agent of defendant offered to sell shoes of similar quality at low prices in the city of Toronto as a test of, or in order to compare with, the value of the shoes in question.

The witness, however, went on to state that he produced specimens of men's and women's shoes which he had offered to sell last January or February, at 50 cents for women's, and 3s. 4d. to 3s. 4½d. for men's, and that 50 boxes which he had in his store, as agent of defendant, could have been purchased at these prices. That as agent of defendant, he had sold shoes to Blogg and Dack at 3s. 4½d. to 4s. 6d. per pair before the seizure, and had not offered any lower than that before the seizure of which he had heard before offering the 50 cases at such low prices. He said that he was not himself a dealer in shoes of this kind.

2. As to the verdict being against law and evidence, Mr. Richards recited the evidence at length, and submitted that the weight of it was decidedly in favor of the finding of the jury. That the invoice from Chaffey & Co. to the defendant (if any) was not produced to shew the price at which the manufacturers sold to him; nor was any evidence on the subject given by them, and that although the invoice to Brown purported to be from them, through the defendant, as their agent, neither Brown & Co. nor Chaffey & Co. claim the goods as theirs; but the defendant. Also, that Brown, though asked on cross-examination (being called as a witness for defendant) did not state what he was to give defendant for the shoes as the price delivered. Stat. 12, Vic. ch. 1, sec. 9.

3. As to the arrest of judgment.

That the *onus probandi* was on the defendant (10 & 11 Vic. ch. 31, sec. 53; 12 Vic. ch. 1, secs. 8 and 9). That the term "*undervalued*" was taken from the statute; and the

test of cash value in the market where purchased or from whence imported, was given in another part of the statute 12 Vic. ch. 1 sec. 6, and that it must mean and be construed to mean the value according to such test, and that the actual value was matter of evidence. That if not so, the objection was at all events cured by verdict; and the preliminaries under sec. 18 were only directory, and that they were not material to be averred as conditions precedent to warrant the seizure, which was made under sec. 6. He cited *Attorney General v. Ratterbury*, 9 Price, 397, also 10 Price, 17; *Lee v. Simpson*, 3 C. B. 871.

Hallinan, in reply, submitted that the facts were strongly in favor of the defendant: that a strict case should be made against him, being in the nature of a criminal proceeding: that the witnesses called on behalf of the Crown were not familiar with the foreign prices, nor had they that knowledge or experience in the premises which rendered them competent to give satisfactory evidence on the subject: whereas those called for the defendant were persons conversant with the business, the nature of the trade, the quality of the goods, and the cash wholesale prices in the principal markets in the United States of America.

That if entered at too low a value, the collector might have taken the goods—stat. 12 Vic. ch. 1 sec. 17—instead of seeking to obtain them as absolutely forfeited.

That surprise in the course of the adverse evidence is a valid ground for a new trial.—*Doe Yager et al. v. Stewart*, 7 U.C.R. 174; *Murphy v. Fraser*, 4 U.C.R. 194.

That the 2nd count was vague and uncertain; no test being pointed out, in comparison with which it was to be determined whether the goods were *undervalued* or not, whether in reference to the domestic or a foreign market, and, if the latter, what foreign market: that the rule of construction is as strict in informations as upon indictments, and an indictment thus framed would be bad.—*Wells v. Iggulden*, 5 D. & R. 21-22; *Rex v. Wilkes*, 4 Bur. 25-56; 1 Hale, P. C. 517; 2 Hale, P. C. 170; *Rex v. Lewis, Sayer*, 204; *Hartley qui tam v. Hooker*, Cowp. 524; *Faulkner's case*, 1 Saund. 250.

Also that the objection was not cured by the verdict, which only shows that the goods were *undervalued* in reference to some test or other or some market or other, but which, or where, not thereby determined or appearing; and if equivocal or questionable, the defect is not cured by the entry being alleged to have been contrary to the statute, nor by any healing effect that can by intendment be attributed to the verdict.—Reg. v. O'Connell (House of Lords' cases).

That the information, as framed, charges no offence; and if not, the verdict cannot make it so.

That the preliminaries mentioned in the statute 12 Vic. c. 1, s. 18, were material to be complied with, as pointing out how the value was to be ascertained before seizure, and ought to have been averred. He also referred to the previous act of 10 & 11 Vic. c. 31, which, except in so far as partially repealed by the 12 Vic. c. 1, was to be construed with it (see sec. 29); and that both combined to show the inspection, &c., by appraisers, material; and the only proceeding by which the description, quantity or quality of the goods, or their value, could be ascertained according to law: that the last act (sec. 18) only declares the goods forfeited, if, upon such examination, they are found undervalued, and that without it the collector could not know whether the value was too low or not. The Chief Justice asked, during the argument, whether the omission to open the cases and inspect the goods could be pleaded as an answer to the information, if that offered a test, or had it been averred whether the averment could have been traversed by plea in denial?

Upon the whole, the defendant's counsel submitted that the 1st count was unsupported in evidence, and there should be a new trial on that ground: that the 2nd count was bad in arrest of judgment; wherefore the judgment must be arrested, or a *venire de novo* awarded.

MACAULAY, C. J.—Without going into a close analysis of the evidence given at the trial of this information, I will merely say that I think that, as to the 2nd count, it was amply sufficient to warrant the finding of the jury: that the goods were *undervalued* in reference to the test for deter-

mining such value, prescribed by statute; and that, being satisfied with the opinion of the jury on that head, I am not disposed to disturb the verdict on this ground.

Nor do I think the affidavit filed shows surprise, or any other sufficient ground for setting it aside.

As to the arrest of judgment: The case of *Regina v. Brunskill*, 8 U.C.R. 546, is quite in point in support of the 2nd count. The 3rd count there was similar according to the report of the case, and was expressly upheld by the court on a similar motion, although another count was disapproved of. Regarding that case an authority in point, and, moreover, concurring in that decision, and deeming the allegations (made, as they are, in the terms of the statute) sufficient, especially after verdict, and although the statement of the test by which undervaluation was to be determined would have rendered it more specific and certain, I think that, if it forms a valid ground of exception in arrest of judgment, the defendant must be referred to a court of appeal, because we follow the decision of a co-ordinate court on a similar count in upholding this.

The report of the case in the Queen's Bench does not shew that the present objection was distinctly taken to the 3rd count, or pressed in argument in that case; but the whole case was maturely considered, elaborately discussed, and the 3rd count expressly affirmed (see the language of the Chief Justice at pp. 558-559); and I think our proper course, in the views we entertain upon the subject, is to follow that decision.

There is certainly room for formal exception, unless the adoption of the words of the statute are strictly sufficient. All we are called upon to decide is the sufficiency of the count after verdict upon the issue joined.—Stat. 4 Geo. III. c. 26; *Middleton v. Wyman* (Willes, 601); and cases cited from 9 & 10 Price's Ex. Repts.; also, 10 & 11 Vic. c. 31, s. 79, at the end, and 12 Vic. c. 10, s. 5, No. 28.

As to the other objection, I consider the act directory only; and that it was satisfactorily answered by Mr. Richards, in his observations upon that part of the rule.

As to the 1st count not being supported in evidence, the verdict may be entered for the defendant, by consent of the

Attorney General, or a *nolle prosequi* entered. There can be no necessity for a new trial on this ground.—See the *Queen v. Brunskill*, *supra*.

McLEAN, J., concurred.

Per Cur.—Rule discharged.

TRINITY TERM, 17 VICTORIA.

Present—The Hon. J. B. MACAULAY, C. J.

“ “ ARCHIBALD McLEAN, J.

“ “ *WILLIAM BUELL RICHARDS, J.

THOMAS DOUGLASS V. JAMES BRADFORD.

Ejectment by sheriff's vendee—Proof of title.

P. brought ejectment for the recovery of land in B.'s possession. B. thereupon attorned to P., and continued in possession. The sheriff afterwards, on an execution against P.'s lands, received by him (the sheriff) before the attornment, sold and conveyed the land in question to D., who then brought ejectment against B. for recovery of the same.

Held, that B. was in privity with P., and bound by the sale.

Held also, that the levy was sufficient, though the sheriff had not made an entry on the land.

Held also, that as between the parties, proof of the *fi. fa.* against P.'s lands, without proof of the judgment was sufficient.

EJECTMENT for lot No. 12, 1st concession, Nelson, new survey. Writ tested, 26th January 1853.

Defendant appeared and defended for that portion of the lot not included in the 13 acres sold for taxes to Thomas Allan Stayner.

The plaintiff's title (at the trial before Burns, J.) consisted of the exemplification under the seal of the Court of Queen's Bench for Upper Canada, certified under the hand of Charles C. Small, Clerk of the Crown, of a writ of *fieri facias*, tested the 18th November, 14 Vic., issued the 23rd November 1850, and returnable the last day of Michaelmas Term 1851, at the suit of Charles Coxwell Small, against the lands and tenements of John Powell, for £52 7s 2d, for damages and costs in assumpsit—directed to the sheriff of the United Counties of Wentworth and Halton, in-

* The Hon. W. B. Richards, Her Majesty's Attorney General, having been appointed to the judgeship vacant by the death of the late Hon. R. B. Sullivan, took his seat upon the bench this term.

dorsed to levy £13 2s. 7d., with interest from 1st May 1843, —£1 15s. 6d., for that and former writs—and sheriff's fees.

This writ was proved by the sheriff to have been received by him on the 25th November 1850.

The return was filed 7th February 1852—lands of said John Powell levied upon to the value of the damages, costs and interest, but which remained on hand unsold for want of buyers, wherefore he could not have the money, &c.

An instrument in writing, headed in the Queen's Bench, "John Doe ex dem. Hagan and others *vs.* James Bradford."

"Know all men by these presents that I, James Bradford, now tenant in possession of the east half of lot No. 12, 1st concession, new survey, township of Nelson, do hereby acknowledge myself to be tenant of the said lot to John Powell, one of the lessors of the plaintiff; and I hereby undertake and agree to rent from him the said lot for three years, at and for the yearly sum of £7 10s. per annum, and to pay all taxes and other assessments upon the said lot; and I further agree to pay the said rent half-yearly, on the 20th days of June and December in each and every year; and I further agree not to cut any timber upon the said lot, except for firewood or fencing, except by the written authority of the said John Powell; and at the end of this lease I promise to deliver up possession, together with all the improvements on the said lot, to the said John Powell, or his attorney, executors, administrators, or assigns.

As witness my hand this 20th December, 1850.

"Signed in presence of,
having been first read and explained. }
(Signed,) JAMES PLUVIES, }

Hb
"JAMES X BRADFORD."
Mark.

A deed poll under the hand of E. Cartwright Thomas, sheriff of the United Counties of Wentworth, Halton and Brant, and his seal of office, dated 27th February 1852, whereby, after reciting that by virtue of a writ of *fi. fa.*, issued out of Her Majesty's Court of Queen's Bench, tested the 18th November, in the 14th year of Her Majesty's reign, A.D. 1850, at the suit of Charles C. Small, to him directed and delivered on the 25th November 1850, commanding him to levy, &c. (as in the above writ), he did *seize and take* as of the lands and tenements of said Powell, all, &c.,

known as lot No. 12, 1st concession, Nelson ; and on the 5th February 1852, public notice having been given according to law, he offered the said lot for sale, and there being no purchaser, returned the said writ, lands and tenements levied, but on hand for want of buyers, &c. (as in the above return), and that by virtue of a writ of *venditioni exponas* and *fi. fa.*, for residue, &c., tested the 2nd February, in the 16th year of Her Majesty's reign, &c. (reciting the writ), he did on the 19th February, year last aforesaid, after public notice for that purpose being given according to law, sell said lot of land, &c., by public auction, to Thomas Douglass, being the highest bidder, at £29 5s. The said sheriff did in consideration thereof grant, bargain, and sell unto the said Douglass, his heirs and assigns for ever, all the estate, right, title, interest, claim, property, or demand, which the said John Powell had of right of, in and to the said lot of land, &c., as fully and absolutely as he the said sheriff could or ought to grant, bargain, and sell the same by force of the statute in such case made and provided, and of the said writs of *fi. fa.* and *venditioni exponas* or otherwise. Registered the 6th March 1852.

Mr. Sheriff Thomas, being called as a witness at the trial, said he advertised and sold the land in the regular way ; that he usually gives notice to the parties ; but did not remember doing so in this case, and that he had never been upon the land.

It was proved that the defendant was living on the lot when he signed by making his mark to the paper writing, dated the 20th December 1850.

The witness thereto said he was then sheriff's officer, had a writ of *fi. fa.* against defendant, and a writ of possession to put defendant out : that Powell went to take possession ; that he did not wish to be hard in turning defendant out, and was willing to let him stay if he became tenant to him ; that defendant proposed to rent the place from Powell ; and he (Powell) drew up the writing, which was read to the defendant ; and the attornment to Powell was in consequence of the agreement to let him stay.

That afterwards, on the 10th September last, possession

was demanded of the defendant by the plaintiff, who replied that he would not give it up—neither plaintiff nor Powell having any right to it.

The defendant's counsel objected—

1st. That no title was shewn in Powell—the attornment not being sufficient, nor an estoppel.

2nd. That the sheriff's deed was insufficient, no judgment against Powell being shewn—nor writ against goods being proved—nor any seizure of the land by the sheriff—the execution of the sheriff's deed not being sufficiently proved, and it not being shewn when the sale took place; all of which were overruled, and the jury found a verdict for the plaintiff.

In last term, *Martin*, for defendant, obtained a rule upon the plaintiff to shew cause why such verdict should not be set aside, for—1, Misdirection; 2, The reception of improper evidence; and 3, As being against law and evidence.

Springer, for plaintiff, shewed cause during the same term.

He relied upon two grounds:

1st. A sufficient title as against Powell. And 2nd. Privy creating the relation of landlord and tenant between Powell and defendant, and disclaimer on defendant's part, putting an end to any claim to remain as tenant, or to notice to quit.

That the instrument in writing of the 2nd December 1850 was sufficient to enable Powell to sustain ejectment—and therefore the plaintiff, who is the sheriff's vendee of his interest in the lands, and entitled as against him without any other proof of his title.

That the writ of *fi. fa.* was sufficient evidence on the part of a stranger to the judgment, as plaintiff was, without producing the latter; and that the writ of execution against lands was in the sheriff's possession before and at the time of the defendant's attornment to Powell. That the recitals in the sheriff's deed, so far as material, are entitled to credit in the plaintiff's favor, *prima facie*, and import a sufficient compliance with the law, in all respects, to give validity to the sale—citing *Doe ex dem. Armour v. McEwen*, 3 O.S. 493;

Doe ex dem. Crew v. Clark, Q. B. U. C., Mich. Term, 4 Vic. R. & H. Dig., "Title" 14; Doe ex dem. Emmett v. Thorn, 1 M. & S. 425; Doe ex dem. Tiffany v. Miller, 6 U. C. R., 445.

That the writ of *fi. fa.* being produced was sufficient, though the writ was in obedience to a writ of *vend. ex.*, the power to sell being derived from the former, and not the latter.—Doe ex dem. Russell v. Hodgkiss, 5 U. C. R. 349; Doe ex dem. Stocking v. Watts, Q. B. U. C. Hil., 6 Vic., R. & H. Dig., "Title" 12.

As to the disclaimer—Doe ex dem. De Costa v. Wharton & another, 8 T. R. 2; Doe ex dem. Putland v. Hilder, 2 B. & A. 782.

Martin, in reply, contended—

1. That if the instrument of 2nd December 1850 amounted to anything, it was a lease of three years, and the term had not expired; and that the language used by the defendant was not a disclaimer, but consistent with his temporary right to possess and enjoy during the term.

2. That the *fi. fa.* against Powell's lands having preceded it, can make no difference, because if the plaintiff sets up the lease from Powell to defendant to shew Powell's title, he adopts it in toto, and is bound by it, and that it shews only a reversionary interest in Powell, and so the ejectment fails. No anterior or other title being shewn in Powell, the lease may be looked upon as the consideration for his acquiring whatever title he has, and cannot be overreached or defeated by the execution.

3. But that it was not a lease, nor of any avail as evidence of title even by Powell; that no previous right or title was shewn in him upon which an attornment could operate, and that otherwise than as a mere attornment it is void in toto.—Co. Lit. 309, a. b.; Platt on Leases, 55-60; Nowke v. Awder, Cro. Eliz. 373; Ib. 436 S. C.; Bessey et al. v. Windham, 6 Q. B. 168; White v. Morris, 21 L. J. C. P. 185, 16 Ju. 500; Adams et al. v. Kingsmill, 1 U. C. R. 355; Doe ex dem. Burr v. Denison, 8 U. C. R. 613; Rex v. Wakefield, 1 Stra. 68; McDonell v. McDonell, 9 U. C. R. 259.

been duly advertised according to law, were, on the 16th October, 1852, exposed to sale and sold to plaintiff for £72, being⁷ the best price that could be obtained therefor, and in consideration thereof bargaining, selling, assigning and transferring unto plaintiff, and his heirs for ever, all the right, title and interest of said Clark, of, in and to the premises in question.

Also another deed poll from the same sheriff to the plaintiff, dated the 29th April 1853, reciting the writ of *fi. fa.* as in the previous deed, and that certain lands were seized and taken in execution, and duly advertised according to law under the said writ, &c. : that such *fi. fa.* was afterwards lost or mislaid ; wherefore the said lands were not then sold : that on the 22nd January 1852 a duplicate *fi. fa.* was placed in his hands ; whereupon the said lands were again advertised, and were, on the 16th October 1852, sold to plaintiff, &c. : that on the 23rd October 1852 the said sheriff had executed a deed to plaintiff, the correctness of which, by reason of some supposed inaccuracies, was doubted, and that he had been requested and consented to execute another ; whereupon he bargained, sold, assigned, &c., the premises in question to the plaintiff.

This deed bears date since action brought, and the supposed inaccuracies in the former deed were not suggested or pointed out at the trial. One may be in the description of the land sold and conveyed. It was then proved that Joseph Clark owned and was possessed of the land from the year 1840 ; and a deed of conveyance, dated the 2nd September 1843, from James Shaw (the former proprietor) to him, was put in and admitted. When defendant entered did not distinctly appear, but no doubt after the issue of the execution in question.

The defendant's counsel objected that the plaintiff's proof was insufficient : that the recital of facts in the sheriff's deed, even if admissible, shewed that the alleged notice of sale had not been acted upon or continued, that the writ was spent before the duplicate issued, and that the proceedings under it could not be revived. — Doe Cameron v. Robinson et al. 7 U. C. R. 335 ; Doe Green-

shields v. Garrow, 5 U. C. R. 233; Doe Young v. Smith, 1 U. C. R. 195.

These objections were overruled for the time, and the case proceeded.

The defence was mainly rested upon a deed from Clark to one Nicolls prior to the issue of the writ of *fi. fa.* in 1846; but in addition thereto, Mr. Deputy Sheriff Jarvis was called, and said he had the duplicate *fi. fa.*; that by a sheriff's memorandum, before the witness was in office, the land was first advertised on the 18th October 1847, to be sold on the 20th January 1848; but actually sold on the 16th October 1852, he imagined, after being re-advertised; but he knew of no postponement of the first sale, and was not in the sheriff's office at the time, not having entered it until the autumn of 1849: that, by the sheriff's books, the writ was received the 1st August 1846, and that it was lost, and a duplicate received, 22nd January 1852: that he could not tell what the sheriff did under the original writ, and only spoke from the memorandum.

It was left to the jury to find for plaintiff or defendant, according to their opinion, upon the question whether the deed from Clark to Nicolls was or was not in fact executed before the delivery of the execution against the lands of the former; and they found for the plaintiff.

In last term, *Freeland*, for defendant, obtained a rule on the plaintiff to shew cause why such verdict should not be set aside, and a new trial had, as being contrary to law and evidence and for misdirection, &c. He cited *Doe Spafford v. Brennan*, 3 O. S. 90; *Haydon v. Crawford*, 3 O. S. 585; *Doe Miller v. Tiffany*, 5 U. C. R. 79; *Doe Tiffany v. Miller*, 6 U. C. R. 426; *Doe Young v. Smith*, 1 U. C. R. 195; *Doe dem. Harley v. McManus*, *ib.* 141; *Doe Greenshields v. Garrow*, 5 U. C. R. 237; *Doe Cameron v. Robinson et al.*, 7 U. C. R. 335; *Doe Burnham v. Simmons*, 7 U. C. R. 196; *Doe ex dem. Stocking v. Watts*, U. C. R. Hilary Term, 6 Vic.—not reported.

Macdonald shewed cause, and contended—

1st. That the defendant could not now object the want of proof of an actual levy, and that the case rested on the

validity of the sheriff's deed—the ground of the rule being that the verdict was contrary to law and evidence: that the evidence of the deputy sheriff, if material, was mere hearsay of what his principal had said or written, and so inadmissible.

2ndly. That *Doe Young v. Smith*, 1 U. C. R. 195, was quite a different case—on the question of abandonment: that the recitals in the sheriff's deed were *prima facie* evidence of the facts, constituting portions of the *res gestæ*; and that there was no pretence to infer an abandonment of the execution, because the writ was lost or mislaid, and the delay duly accounted for—*Doe Greenshields v. Garrow*, 5 U.C.R. 237: that the sheriff's deed recited all necessary facts, and there was no evidence to repel or controvert them—*Haydon v. Crawford*, 3 O. S. 585; *Doe Spafford v. Brennan*, 3 O. S. 90; *Doe Tiffany v. Miller*, 6 U.C.R. 426; *Doe Cameron v. Robinson et al.*, 7 U.C.R. 335: that the last of the sheriff's deeds was in corroboration of the former, and recited a seizure, and, if necessary to perfect the execution of his power to sell, a legal conveyance—*Doe Tiffany v. Miller*, 5 U.C.R. 444; *Doe Young v. Smith*, 1 U.C.R. 195: that defendant was proved to be in possession under a fraudulent deed, and had no right to put the plaintiff to strict proof of title. (a)

Freeland, in reply, said the real defendants were free of all imputations of fraud, and contended that the sale was abortive; and, looking at the sheriff's deeds, as at the close of the plaintiff's case, they imparted no interest or title to the plaintiff, the writ of *fi. fa.* not having been kept alive, but suffered to lapse: that to continue it, the notice of sale or some active step indicating its continuance, ought to have been shewn; whereas the notice of sale was not repeated so as to keep it alive, but it was suffered to lie dormant for years, i. e. from 1846 to 1852, and was in effect and in fact abandoned long before the issue of the duplicate writ, which of itself could not revive it—*Doe ex dem. Young v. Smith*, 1 U. C. R. 195; *Doe Harley v. McManus*, 1 U.C.R. 141—there was evidence of

(a) But he held under a *bona fide* mortgage.

assent and acquiescence by the debtor ; Doe Miller v. Tiffany, 5 U.C.R. 79 ; Doe Greenshields v. Garrow, 5 U.C.R. 237 ; Doe Burnham v. Simmons, 7 U.C.R. 196 : that the facts, if inferred from the sheriff's deed at the close of the plaintiff's case, were repelled by defendant's evidence : that the deputy sheriff's evidence was not objected to at the trial, but he was cross-examined without exception, and it cannot be now made a ground of opposing a new trial : and that, on the whole, the sale was clearly abortive, and not supported by any existing execution attaching upon the land at that time.

MACAULAY, J.—The cases shew sufficiently, I think, that credit is to be *prima facie* given to the sheriff's return and recitals in his deed, as part of the *res gestæ*, and he is presumed to have acted *bona fide* in the discharge of his official duty.(a)

There is no reasonable ground, in the whole aspect of the case, to presume an abandonment of the writ.

The evidence of the deputy sheriff was not strictly admissible ; but even with it, I do not think the sheriff's sale is proved to have been nugatory, invalid and void.

The writ conferred a power to sell, which, being only deferred or postponed, did not expire or cease—Chance on Powers, 294.

The case of Doe ex dem. Boulton v. Fergusson, 5 U.C.R. 515, is much in point to shew that, in the absence of any proof to the contrary, all should be presumed rightly done that should have been done to render the sale valid.

I was not requested to leave any particular fact to the jury touching the course or order of the sheriff's proceedings, and rested on presumption. I do not think it can be inferred that what the sheriff recites (namely, that he did seize in execution the land sold by him and now in question) is not true.

McLEAN, J., concurred.

Per Cur.—Rule discharged.

(a) Burden v. Kennedy, 8 Atk. 739 ; Palmer's case, 4 Co. 74 ; Gouldsb. 172 ; Gyfford v. Woodgate et al., 11 East. 297 ; Cator v. Stokes, 1 M. & S. 599 ; Watson's sheriff, 72 ; Bessey and another, v. Windham, 6 Q. B. 166 ; White v. Morris, 11 Am. Eng. Rep. 516, 16 Ju. 600, 21 L. J. C. P. 185 ; Chambers v. Bernasconi et al., 1 C. & J. 461 ; S. C. in Error, 1 C. M. & R. 347.

WILKES V. THE TOWN COUNCIL OF BRANTFORD.

Police magistrates—remedy for recovery of salaries.

Held that the statute 12 Vic. ch. 81 makes it not only the duty of a town council to pay their police magistrate, but creates a debt the payment of which the magistrate may enforce in an action of *debt*—not as founded upon a contract express or implied, but on the statute and the rights which it confers.

Held also, that, under the statute, the action may be maintained without the aid of a by-law of the municipality to confer it.

Quære—Is debt the only remedy?

DEBT for £400.

Writ issued 2nd March 1853. Declaration 9th March 1853.

1st count stated, that the plaintiff on the 27th of December 1850, after the passing of the statute 12 Vic. ch. 81, was duly appointed police magistrate of the said town of Brantford, and was from thence for two years lawfully exercising his said office, and thereby and according to the said statute became entitled to receive a salary of not less than £100 per annum, payable quarterly out of the municipal funds of the said town—of all which defendants had due notice; and thereby, by reason of a large sum, to wit, £200 for eight quarterly payments, at the rate of £100 per annum, having been due and payable out of the said funds, and being in arrear and unpaid, although the said funds have always been and still are sufficient to allow of such payments being made thereout, an action hath accrued to the plaintiff, to demand and have of and from the defendants the said sum of £200, parcel, &c.

2nd count—£200 for work, labor and materials, money had and received, and upon an account stated, payable on request—breach, non-payment, &c.

Pleas to first count—1st. Never indebted, *modo et formâ* and issue.

2nd to first count—That plaintiff did not exercise the said office of police magistrate, &c., *modo et formâ* alleged, and issue.

3rd to first count—That the municipal funds of the said town of Brantford have not been sufficient to allow of such payments being made thereout as in first count alleged.

4th. As to £50, part of the sum mentioned in first count,

payment and acceptance of £40 (after accrual of the cause of action in respect thereof) in satisfaction.

5th. As to £50, part, &c., in first count mentioned, a set-off for money had and received by plaintiff to defendants' use, &c.

6th. *Nil debit* to the second count.

At the trial, before Mr. Justice Burns, at the last spring assizes for the county of Brant, the plaintiff produced a commission, under the great seal of the province, dated 27th December 1850, appointing him police magistrate of the town of Brantford, with all the profits, &c., during pleasure. It recited the statute 12 Vic. ch. 31, but did not state that any such appointment had been requested by the defendants.

By another instrument under the great seal, dated the 1st December 1852, the above commission was rescinded from and after the 31st December 1852.

The plaintiff took the oath of office at Brantford on the 2nd January 1851, before P. VanBrocklin, J. P.

The plaintiff also proved a resolution of the town council, passed on the 23rd December 1850, recommending that the Government do appoint the plaintiff to the office of police magistrate for the town of Brantford, and that the mayor should signify the same to the Governor General; which, it was admitted, he had done.

He likewise proved that he had officiated as police magistrate in 1851 and 1852, and evidence to shew neglect of duty was rejected.

As to the state of the funds, it was proved that in the first quarter of 1851, ending 1st April, there was a balance of £79 13s. 4d. in the treasurer's hands; on the 1st July 1851, £41 12s. 10d.; on the 1st October, 1851, £8 19s. 2d., and on the 31st December 1851, £24 15s.; but that such balances included school monies and all monies, and it could not be explained how much constituted town funds as distinguished from school funds, &c.: that at the end of the first quarter, April 1852, the balance was £45 1s. 9d.; of the 2nd July, £114 9s. 7d.; of the 3rd October, £158 16s. 11d., and at the end of the year, £829 15s. 2d.,

including school funds, &c.; but the school fund had then been overdrawn £11. The plaintiff claimed £160 13s. 9d. and £12 interest.

For the defendant. It was objected :

1st. That the action of debt would not lie for the plaintiff's salary, either under the statute or as upon contract.

2nd. That the remedy was by mandamus to the treasurer to pay, or to the defendants to pass a by-law fixing the salary and directing its payment.

The learned judge was disposed to think the action not sustained, and that the remedy was by mandamus, and directed a verdict for the defendants; but it was agreed that it should be entered for the plaintiff for £160 13s. 9d. if the court should be of opinion the plaintiff was entitled to recover.

In Easter Term last, *Wilkes*, the counsel for the plaintiff, obtained a rule upon the defendants to shew cause why it should not be changed accordingly.

In Trinity Term following, *Hagarty*, Q. C., shewed cause, and contended—referring to the statute 12 Vic. ch. 81, secs. 69, 70, 172, and 31 No. 7—that debt would not lie, especially without a previous by-law fixing the plaintiff's salary.

That liability to this action does not result from the facts as a legal consequence, either under the statute or upon an implied contract.

That the only remedy in this court is by mandamus.

He cited and commented upon *Hopkins v. Mayor &c. of Swansea*, 4 M. & W. 621; *Ewer v. Jones*, 6 Mod. 31, Holt 419, 2 Sal. 415; *Hall v. Mayor &c. of Swansea*, 5 Q. B. 526,—assumpsit for money had and received; *The Queen v. The Mayor &c. of Gloucester*, 5 Q B. 862,—as to mandamus; *Hogg v. Pearce* 10 C. B. 549.

Also, that if any action was maintainable, it should be case for a breach of duty and not debt—*Cane v. Chapman* 5 A. & E. 657.

That there was no sufficient privity created, nor any contract to create it.

Wilkes, in reply, submitted that the action did lie; that it is incorrect to say debt only lies upon a contract express

or implied by law; for that it is also maintainable under a statute which entitles the plaintiff to a pecuniary compensation like the present: that it does not rest upon privity of contract; but on the principle of *Ewer v. Jones*, 6 Mod. 27, the statute confers the right and the law gives the remedy by action of debt. He remarked on the special allegation, that there were funds sufficient to meet the demand. *Tilson et al. v. Warwick Gas. Co.* 4 B. & C. 962; *Carden v. Gl. Cemetery Co.* 8 L. J. C. P. 165, 7 Scott 97, S. C.; 5 Bing. N. S. 253, S. C.

That the plaintiff has no direct recourse against the treasurer, who is the officer of the defendants—*Cane v. Chapman*, *supra*, 5 A. & E. 647.

On the subject of mandamus, he said it was only a course adopted when no other legal remedy existed—*The King v. The Bank of England*, Doug. 504; *The King v. Bristow*, 6 T. R. 168.

He commented upon *Hopkins v. Mayor of Swansea*, 4 M. & W. 621, 8 Ib. 901, and said that no previous by-law was necessary, the plaintiff claiming only the minimum amount of salary, £100, and that it was unnecessary to request the defendants to pass a by-law, and therefore not necessary to apply for a mandamus for that purpose, or to sue in case as for a breach of duty in not passing one.

He relied upon the right to maintain the present action by force and virtue of the statute: that *Bogg v. Pearce*, 10 C. B. 540 was *assumpsit*, and so not in point; *Addison v. Mayor of Preston*, 16 Jur. 643; 10 Am. Eng. Rep. 489.

MACAULAY, C. J.—This case is not before us upon a demurrer to the declaration, but upon a rule to set aside a verdict for the defendants, and to enter it for the plaintiff. There are six pleas; but it is not necessary to notice them in detail, or to consider the burthen of proof which they cast upon the parties respectively, because the only objection taken at the close of the plaintiff's case, and relied upon in the argument of this rule is a general one—namely, that the action does not lie upon the evidence adduced by the plaintiff. This objection too is purely one of law, for it does

nocall in question the sufficiency of the proof to establish all the allegations of fact laid in the first count of the declaration—but denies the plaintiff's right to sustain that count in point of law, on the ground that the defendants are not liable in debt for the arrears of salaries to which plaintiff shewed himself entitled. The declaration alleges the existence of adequate funds, which is denied by the third plea. There was ample proof that there were such funds at the period when the plaintiff was removed from office, though not at the expiration of each successive quarter which he held it. And no objection was taken to the sufficiency of the proof to establish this issue in favour of the plaintiff.

Then, as to the general question of liability :

The statute 12 Vic. ch. 81, sec. 69, enacts that there should be in each (incorporated) town a police office, &c., and sec. 70, that the police magistrates for the several towns which should be or remain incorporated as such under that act, should be appointed by the crown during pleasure, &c., "and shall receive a salary of not less than one hundred pounds per annum, payable quarterly out of the municipal funds of such town :—Provided, that a police magistrate should not in the first instance be appointed for any such town until the corporation of such town should have communicated to the Governor General of the Province, through the secretary thereof, their opinion that such an officer was required for the better conduct of the affairs of such town and administration of justice therein."

The general powers of the town councils are by section 67 adopted from those of villages incorporated, whose powers are, by section 59, to a certain extent made similar to those of townships—though extended, by section 60. And by section 31, the township councils are, among other things, empowered to make by-laws—No. 7, for settling the remuneration of all township officers in all cases where the same is not, or shall not be settled by act of the legislature, and for providing for the payment of the remuneration by such act of the legislature, or by the by-laws of the said municipality, provided and appointed for all township officers whatsoever, &c. See sec. 81, Nos. 8, 9.

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The 12 Vic. ch. 81, sec. 177, and 14 & 15 Vic. ch. 109, Sch. A. No. 24. provide that it should be the duty of such municipal corporations respectively (subject to the provisions hereinafter contained) to cause to be assessed and levied upon the whole ratable property of their several towns, &c., a sufficient sum of money in each year to pay all debts incurred or which should be incurred, with the interest thereof, which should fall due or become payable within such year, &c. See sec. 181.

12 Vic. ch. 81, sec 171, and 13 & 14 Vic. ch. 67, sec. 60, provide for the appointment of treasurers by incorporated towns, &c., and the securities to be given by them to the municipality, &c. Section 172 of the 12 Vic. ch. 81, prescribes the general duties of such treasurer—"to receive and safely keep all monies belonging to the town, &c., and to pay out the same to such persons and in such manner as he shall be directed to do by any lawful order of the municipal corporation thereof, or by any law in force or to be in force in Upper Canada, and strictly to conform to and obey any such law, or any by-law lawfully made," &c.; and see 13 & 14 Vic. ch. 64, Sch. A. No. 32. As to the defendants' power to sue and liability to be sued, 12 Vic. ch. 81, sec. 2.

I do not think the plaintiff's remedy is against the treasurer for the time being, who is removeable at the pleasure of the municipal council, and is subject to the orders thereof (a); the statute does not say he is to pay police magistrates, or that the only remedy against the defendants is by mandamus to levy a rate or to pay the plaintiff, or by an action on the case as for a breach of duty. But it appears to me that the statute 12 Vic. ch. 81 makes it not only the duty of the defendants to pay, but creates a debt the payment of which the plaintiff can enforce in an action of debt; (b) not as founded on contract express or implied, but on the statute and the rights which it confers to a salary of £100 in the absence of any greater allowance granted under a by-law of the defendants. I infer this from the language of the statute, and the facts of

(a) *Hopkins v. The Mayor, &c., of Swansea*, 4 M. & W. 644, 647.

(b) *Addison v. The Mayor of Preston*, 21 L. J. C. P. 146.

the case applied to such authorities as the following—*Ewer v. Jones*, 6 Mod. 26 ; 2 Sal. 415 ; *Tilson and another v. The Town of Warwick Gas Co.*, 4 B. & C. 962, 7 D. & R. 376.—Same Case, at page 967 of 4 B. & C., Bayley, J., says, "Where an act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law enables those persons to maintain an action of debt." *Holroyd, J.*, said the facts stated shewed that the defendants were under a legal obligation to pay the money to the plaintiff, and constituted a debt.—See 7 D. & R. 382 ; *Hopkins v. The Mayor of Swansea*, 4 M. & W. 621.—At page 641, Lord Abinger says, "because the act of Parliament gives the right to receive, it imposes upon those who are to pay the obligation to pay." See also the language of Parke, B., 643-4, and of Alderson, B., 647-8.

8 M. & W. 901, same case in error affirmed, and both cases affirming the principle of Lord Holt, as stated in 6 Mod.—however inapplicable to the case then before the court. See also *Carden v. The General Cemetery Co.*, 5 Bing. N. S. 253-8 ; S. C. 7 Scott, 97.

In *The Queen v. The Hull & Selby Railway Co.*, 6 Q. B. 70, *Patterson, J.*, speaks of the remedy by mandamus which was urged there as being the only remedy, and said that an action of debt lies, and is a no less effectual remedy ; that in each case the jury might assess the amount to be recovered, and that a peremptory mandamus could be enforced only by distress of the goods, to which recourse would be had then in an action of debt. Now, referring to our statute, 12 Vic. ch. 81, sec. 179, the remedies, if not equivalent, would be more effectual, as against a municipal corporation through the medium of an action of debt followed by an execution. See *Regina v. The Mayor of Gloucester*, 5 Q. B. 862 ; see also *Addison v. The Mayor &c. of Preston*, 21 L. J. Q. B. 361 ; 14 Am. Eng. R. 18 ; 1 Stephens' Municipal Acts, 491.

The cases in which the action of debt has been overruled, on the ground that the remuneration to which the plaintiff was entitled was only payable out of a particular fund, are in that respect distinguishable from the present,

and do not govern it—such as *Jones v. The Mayor of Carmarthen*, 8 M. & W. 605; *The Queen v. Ledgard, Mayor of Pool, &c.*, 12 Q. B. 616,—a case of mandamus to enforce a judgment.

Addison v. The Mayor, &c. of Preston, 21 L. J. C. P. 146, 10 Am. Eng. R. 489; S. C., 16 Jur. 543—*Jervis, C. J.*, put that case upon the ground that, admitting the legal right of the plaintiff to receive, there was not a legal liability on the part of the corporation, as a corporation, to pay out of their corporate property, not out of a specific fund, but out of all their property, the debt which the plaintiff contended they were liable to pay. But in the case before us both propositions combine in the plaintiff's favour.

The case of *Bogg v. Pearce* and another, 20 L. J. C. P. 99, was an action of assumpsit, and is in other respects plainly distinguishable. It would be applicable if the plaintiff was proceeding against the Crown to enforce payment, as having been appointed by the Queen under the great seal—S. C. 10 C. B. 534. And I cannot say I think the decision a satisfactory one, if it is to be understood as having decided that debt would not have been maintainable against the commissioners if they had funds accruing from the rates, &c., sufficient to pay the plaintiff's salary.

As to the remedy by mandamus, see *Archbold's Crown Office*, 252, 3, 4, and cases there mentioned; 1 *Stephens' Municipal Corporation Acts*, 436 and sequel, and cases cited by Mr. Wilkes and Mr. Hagarty in argument.

I do not perceive in the authorities, taken together, that if it be a remedy open to the plaintiff on this occasion, it is the only remedy—but that debt, if not the only one, is a concurrent and appropriate remedy, for the recovery of £100 a year, being the minimum allowance provided by the statute, and no other or greater seems to have been substituted by any by-law of the municipality. The amount of £100 yearly I think the plaintiff entitled to under the statute, without the aid of any by-law to confirm it.

Upon the whole, therefore, I arrive satisfactorily at the

conclusion that the action is maintainable under the first count, and that the rule should be absolute to enter the verdict for the plaintiff as to the first count.

McLEAN, J., concurred.

Per Cur.—Rule absolute as to the first count.

IN RE HAYES AND ANOTHER AND THE BOARD OF SCHOOL TRUSTEES OF THE CITY OF TORONTO.

Common School Law—Application for separate schools.

Application for a mandamus to the Board of School Trustees of the City of Toronto, commanding them to authorize the establishment of a separate Roman Catholic school in *school section No. 9*, in St. James's Ward, in the said city.

Held, that the Board, and not the applicants, is to prescribe the limits of separate schools, and that the application should therefore be for *one or more such schools* in general terms,—leaving it to the Board of Trustees to define the limits.

This was an application by *Hallinan*, on behalf of Thomas Hayes and John Patrick O'Neill, to call on the Board of School Trustees of the city of Toronto to shew cause why a mandamus should not issue commanding them to authorise the establishment of a separate Roman Catholic school in *School Section No. 9 in St. James's Ward in the said city*, founded upon a demand in writing by twelve heads of Roman Catholic families resident within the said section No. 9, and a refusal.

MACAULAY, C. J.—Upon reference to the common school acts, passed since the union of the provinces of Upper and Lower Canada, it will be found :—

(1.) That by the statute 4 & 5 Vic. ch. 18, sec. 5, No. 1, (which applied to all the province of Canada,) the district council of each district was made a board of education in such district, with powers to divide the several townships, &c., within their district, into *school districts*; and by sec. 15, for cities and towns corporate, similar powers were vested in the corporation of each of such cities and towns :

That sec. 7 provided for the election of "common school commissioners," and defined their powers :

That sec. 11 provided for the establishment of separate

schools by any number of the inhabitants of any township or parish professing a religious faith different from that of a majority of the inhabitants of such township or parish, and dissenting from the regulations, &c., of the common school commissioners.

Sec. 7, Nos. 1 and 7, and sec. 9, provided for school houses, &c., (See also 4 & 5 Vic. ch. 10, sec. 39, sub-sec. No. 7.)

(2.) That by statute 7 Vic. ch. 29 (which repealed the principal part of the above act in Upper Canada) sec. 14, there should be a superintendent of common schools in each township, town or city, to be appointed by the council thereof, (Query—How such councils provided for?) who should divide such township, town or city, subject to the approval of the Council thereof, into "*school districts*," and parts of districts, &c.

That secs. 42 and 43 provided for the election of trustees of the common school of each *school district*, and that secs. 17, 20 and 21 related to alterations or changes in such school districts.

That sec. 55 enacted that in all cases wherein the teacher of any such school should happen to be a Roman Catholic, the Protestant inhabitants should be entitled to have a school with a teacher of their own religious persuasion, upon the application of ten or more resident freeholders or householders *of any school district, or within the limits assigned to any town or city school*; and in like manner, when the teacher of any such school should happen to be a Protestant, the Roman Catholic inhabitants should have a separate school with a teacher of their own religious persuasion, upon a like application.

Sec. 56 provided the conditions and mode of establishing such separate schools.

The 8 Vic. ch. 41 repealed the 4 & 5 Vic. ch. 18 as to Lower Canada.—Sec. 26 relating to religious dissentients.

(3.) That by statute 9 Vic. ch. 20, sec. 9, the council of each district should cause each township, or parts of adjoining townships; town or city in such district to be divided into a convenient number of sections and parts of sections, which might be altered at their discretion, &c.

Sec. 10 provided for purchasing school sites, &c.

Sec. 17 to sec. 25 provided for the election of school trustees for each *school section*. Sec. 27 prescribed their duties; and also provided for the erection and repair of school houses, &c.

Sec. 32 enacted that in all cases wherein the teacher of any common school should happen to be a Roman Catholic, the Protestant inhabitants of the *section* to which such school belonged should be entitled to have a school with a Protestant teacher, upon the application of ten or more resident landholders or householders of any such school section, or *within the limits assigned to any town or city school*; and in like manner, when the teacher of any such school should happen to be a Protestant, the Roman Catholic inhabitants should have a separate school with a teacher of their own religious persuasion, upon a like application.

The 45th sec. repealed the 7 Vic. ch. 29, and provided that all these divisions of townships, towns or cities, which in the said act were called "*school districts*" should be called "*school sections*."

The 9 Vic. ch. 27 provided for schools in Lower Canada—sec. 26 relating to religious dissentients.

(4.) By statute 10 & 11 Vic. ch. 19, sec. 1, the council of each city, &c., was clothed with similar powers with those conferred on the municipal councils of districts, by 9 Vic. ch. 20, subject to the modifications, &c., therein provided for.

By sec. 2 the council of each city was to appoint a board of school trustees; and the *board of school trustees of such city or town*, &c., by sec. 5, No. 3, were to determine the number, sites, and description of schools which should be established and maintained in such city or town, and whether such school or schools should be *denominational* or *mixed*, &c. Also, No. 5, to appoint a committee not exceeding three persons to each school; provided that in *denominational schools*, the persons composing such committee should be of the religious persuasion to which such schools belonged.

(5.) The statute 12 Vic. ch. 83, which by sec. 81, repealed all former acts—by sec. 17 continued as school sections all *divisions* of townships, towns, or cities then existing and

called "*school sections*" until altered, and the trustees of such sections were also continued, &c.

Sec. 18 empowered the municipal council of each township, town and city to alter any school section, &c. (See also secs. 40, 41, 43, 44.)

Sec. 20 and following sections provided for the election of *trustees of school sections*; sec. 28, to be a corporation, &c. And as to religious books and exercises—see sec. 54, No. 3.

Sec. 38 provided for school houses, &c.

Secs. 69 and 70 provided for separate schools for colored people. Nothing is contained therein respecting *denominational* schools.

12 Vic. ch. 50 amended the school laws of Lower Canada. Sec. 18, relating to schools of dissentients.

(6.) By 13 & 14 Vic. ch. 48, sec. 1, the 7 Vic. ch. 29, and 12 Vic. ch. 83 were repealed—providing that all *school sections* or other *school divisions* should be valid and in full force, until altered, modified, or suspended under that act.

Sec. 3 provides for the election of trustees in all *school divisions* (*except in cities, &c.*) legally established and called "*school sections*." The 4th and following sections relate to the same subject. Sec. 12 prescribes the duties of the trustees of each *school section*.

Sec. 18, No. 3, empowers *township councils* to form, alter, or unite school sections.

Sec. 22 provides for the election of *trustees* to form a *board of school trustees* in cities, &c.; sec. 24, to be a corporation, &c., with powers (No. 4) (a) to determine the number, sites, kind and description of schools which should be established and maintained in such city or town, &c.

Sec. 19 enacts that it shall be the duty of the municipal council of any township, and of the board of school trustees of any city, &c., on the application in writing of twelve or more resident heads of families, to *authorize* the establishment of *one or more* separate schools for Protestants, Roman Catholics, or colored people; and in such case, *it shall pre*

(a) Like 10 & 11 Vic. ch. 19, sec. 5, No. 3.

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scribe the limits of the divisions or sections for such schools, and provide for the first meeting for the election of trustees, according to the 4th section of the act, and for such schools going into operation at the same time, (see sec. 18, No. 4,) with power to make alterations in school sections.

Sec. 19 further provides, secondly, that none but colored people shall vote for trustees of the separate school for their children, and none but the parties petitioning for or sending children to a separate Protestant or Roman Catholic school shall vote for trustees of such school.

It provides, thirdly, for the proportions in which such schools shall be entitled to share in the school fund, &c.

It provides, fourthly, that no Protestant separate school shall be allowed in any school division except when the teacher of the common school is a Roman Catholic; nor shall any Roman Catholic separate school be allowed except when the teacher of the common school is a Protestant. And, fifthly, that the trustees of the common school sections within the limits of which such separate school section or sections shall have been formed, shall not include the children attending such separate school or schools in their return of children of school age residing in their school sections.

Now, the 19th is a general clause, extending to the municipal councils of each township and the board of school trustees of any city, &c., throughout Upper Canada, and includes in one provision separate schools for Protestants, Roman Catholics and colored people, which were not thus blended in any former act.

Then, bearing in mind the different provisions made for the formation of school sections or divisions in townships and cities, &c., and for the election of trustees for school sections in townships, and of trustees of boards of school trustees in cities, &c.; also, that in townships, &c., it rests with the municipal councils to declare, alter, or unite school sections, and not with the trustees of sections, but that in cities, &c., it rests with the boards of school trustees; it will be seen that the provision in sec. 19 for the election of trustees of separate schools—the second proviso

defining the right to vote at the election of such trustees, and the fifth proviso respecting the returns of children by trustees of school sections, relate properly to townships, &c., where the municipal councils determine the sections, and wherein trustees are elected for such sections; though no doubt boards of school trustees are within the spirit of the last so far as respects their reports under sec. 24, No. 11.

So the proviso appointing the time for separate schools going into operation, according to sec. 18, No. 4, may perhaps bear a like relation; and it is by no means clear that in the fourth restrictive proviso the words "*school divisions*" may not mean "school sections" of which trustees are separately elected—though, of course, both such provisos may extend to and include cities, &c. At all events, comparing the previous or first part of sec. 19 with the provisions contained in former statutes, and considering the terms in which it is expressed, there seems little ground to place upon it any other construction than that (as enacted) *it* (i. e. the municipal council of a township, or the board of school trustees of a city, &c.) shall prescribe the limits of the divisions or sections for separate schools—a construction strengthened as to cities, &c., by the 4th sub-sec. of sec. 24, enabling the boards of trustees to determine the *number, sites, kind* and *description* of schools which shall be established in such city, &c.

Whether the city of Toronto has been divided into school sections under former acts, or the present statute, or whether by the city council, the superintendent of common schools, or a board of trustees, does not appear; but at present the power and discretion are clearly vested in one general board, in which to be exercised, of course *bona fide*, in fulfilment of the intentions of the legislature and the spirit of the act.

The present application being restricted to *School Section No. 9 in St. James's Ward*, raises the question whether the applicants are entitled as of right to have such a school established within the limits of that section, and involves the more general question, whether the Board of Trustees can, on separate application by twelve or more heads of families, (whether Roman Catholic, Protestant, or colored

people) be compelled to authorise the establishment of separate schools in each common school section or division into which the city may be divided—in which event three schools might be required in each of such sections or divisions.

We are disposed to think the limits of separate schools are in the discretion of the Board of Trustees, and that they are not restricted by the request of the applicants to a particular section or sections assigned as limits for common schools generally; which last mentioned limits the Board is also empowered to alter *ad libitum*; in short, that the Board, and not the applicants, is to prescribe the limits of separate schools, and that applications should therefore be for the establishment of one or more such schools in general terms, leaving it to the Board of Trustees to define the limits—a duty which no doubt ought to be performed with a due regard to the number of children for whom such schools are required and are to be provided, and the residence of the families to which they belong.

If, after this intimation of the present inclination of the court, Mr. Hallinan desires to persevere, we are willing to hear further argument, and he can take a rule to shew cause in the terms of his motion; but it is for him to consider that if the rule is eventually discharged it may be with costs against the applicants.

MoLEAN, J., concurred.

Per Cur.—Rule discharged.

FAIR V. MOORE.

Municipal Corporation—Liability of Mayor for refusing to seal a lease.

Case against the Mayor of a municipal council.

Cause of action—that the Council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the Council while in session, and defendant being Mayor, did instruct and order him as such Mayor, for and on behalf of the Council, and in the name of the Council, to make and execute the lease—of which he had notice—but which he maliciously refused to do, though thereunto requested.

Held, action not maintainable.

CASE—*Declaration*.—For that whereas, before, and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, the town of Brantford was

duly incorporated as such town, under and by virtue and according to the form of the statute in such case made and provided ; and whereas afterwards, and before, and at the time of the committing of the grievance by the defendant, as hereinafter mentioned, certain persons, to wit, John Henry Moore, Charles Merigold, Henry Lemmon, George S. Wilkes, Joseph D. Clement, William Mathews, Robt. Sproule, Frederick T. Wilkes, James Woodyatt, John W. Downs, Jabez Rowe, John Kerby, Gabriel Balfour, Daniel M'Gilkison, Allan Cleghorn, Ebenezer Roy, and Charles Watts were duly elected, chosen, constituted, and appointed councillors for the several wards of the said town of Brantford, according to the form of the statute in such case made and provided ; and whereas afterwards, and before, and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the defendant was duly elected, chosen and constituted, mayor of the said town of Brantford, according to the form of the statute in such case made and provided ; and whereas, thereby, then and thenceforth, until and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the defendant and the said certain persons did form, and were the council of such town of Brantford, under and by virtue of the statute in such case made and provided ; and whereas while the said council was in existence as aforesaid, and before and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the said council had duly met, and continued to be, and were in session according to the form of the statute in such case made and proved ; and whereas, while such council was so in session as aforesaid, and at the time of the committing of the grievances by the defendant as hereinafter mentioned, the same council had full power and authority to grant, demise, lease, set, and to farm let unto the plaintiff, his executors, administrators, and assigns the lands and tenements hereinafter mentioned, for and during the contemplated term hereinafter mentioned, and upon the contemplated stipulations, provisoes and conditions herein-

after mentioned, by means of the contemplated lease hereinafter mentioned ; and whereas, then and at the time of the committing of the grievances by the defendant as hereinafter mentioned, in order so to grant demise, lease, set, and to farm let to the plaintiff, his executors, administrators, and assigns such lands and tenements for such contemplated term, upon such stipulations, provisoes, and conditions, by means of such contemplated lease hereinafter mentioned, it was necessary and indispensable that the defendant, as such mayor as aforesaid, should for and on behalf of such council, and in the name of such council, and under the common seal thereof, make and execute the said contemplated lease to the plaintiff, his executors, administrators, and assigns which is hereinafter mentioned ; and whereas the said contemplated lease, without being so executed under such common seal, was and is wholly useless and valueless to the plaintiff ; and whereas the said council while so in session as aforesaid, and before the commencement of this suit, heretofore, to wit, on the fourteenth day of April 1851, *at the request of the plaintiff, did consent, resolve and determine to grant, demise, lease, set, and to farm let unto the plaintiff*, his executors, administrators, and assigns, and the plaintiff did then consent to accept, as such tenant of such council, all that piece or parcel of land and tenements situate, lying and being in the said town of Brantford, &c. ; To have and to hold the said piece or parcel of land and tenements to the plaintiff, his executors, administrators and assigns from the fifteenth day of April 1851, for and during, and unto the full end and term of eight years seven months and one half-part of a month thence next ensuing and fully to be complete and ended—the plaintiff, his executors, administrators and assigns paying rent therefor, at the rate of &c. ; and afterwards and before the commencement of this suit, and while the defendant was mayor as aforesaid, to wit, on the same day and year, the same council, at a certain session thereof, held according to the form of the statute in such case made and provided, at the request of the plaintiff, and in order to effectuate such contemplated

demise, leasing and tenancy of such lands and tenements upon such terms as aforesaid, *did then consent, resolve and determine, that a lease containing such conditions, provisoes, stipulations, covenants, and agreements of and concerning the said lands and tenements, should be made and given by the said council to the plaintiff, and should be in form, and in the words and figures following, that is to say—*“This indenture, made” &c.—(setting out the lease with a covenant for renewal and other covenants).

And the said council, while so in session as aforesaid, and for the purpose aforesaid, the defendant still continuing to be and being such mayor as aforesaid, did then instruct, require, direct and order the defendant, as such mayor as aforesaid, for and on behalf of the said council and in the name of such council and under the common seal thereof, to make and execute such lease to the plaintiff, his executors, administrators, and assigns; and whereas, afterwards and before, and at the time of the committing of the grievances by the defendant as herein-after mentioned, to wit, on the same day and year, the plaintiff, having full knowledge and notice of the premises, and confiding therein, and supposing and relying that the said lease would be so made and executed, and the said lands and tenements demised to him for the term and in the manner above contemplated by the said council, and for the purpose and with the intention of, before the expiration of the first year of the said contemplated term, erecting the messuage or tenement in his contemplated covenant in that behalf to be contained in the contemplated lease above mentioned as aforesaid, did purchase, obtain, carry into, and deposit upon and adjoining to the said lands and tenements, divers large quantities of building materials, goods, chattels and effects, to wit, &c., of great value, to wit, of the value of three hundred pounds, and in so doing did necessarily expend large sums of money, to wit, to the amount of two hundred pounds, and did so necessarily incur divers debts and liabilities, to wit, to the amount of two hundred pounds, no part of which building materials, goods, chattels, or effects the plaintiff would have purchased

or obtained, carried into, or deposited upon or adjoining to such lands and tenements, and no part of which monies the plaintiff would have so expended, and no part of which debts and liabilities the plaintiff would have incurred, but for the premises; and therefore it then became and was the duty of the defendant, so long as he continued to be such mayor as aforesaid, and so long as such resolutions, determinations, instruction, requisition, direction and order of the said council continued to be and was in force and effect, and upon the reasonable request of the plaintiff in that behalf as such mayor as aforesaid, so to make and execute such lease in manner aforesaid. And the plaintiff says that afterwards, and while the said defendant so continued to be and was such Mayor as aforesaid, and while such resolutions, determinations, instruction, requisition, direction and order of the said council continued to be and were in force and effect, and at a time and upon an occasion when the defendant could properly and conveniently as such mayor as aforesaid so make and execute such lease in manner aforesaid, to wit, on the fifteenth day of April 1851, the plaintiff did so reasonably request the defendant as such mayor as aforesaid so to make and execute such lease in manner aforesaid. Yet the defendant, well knowing the premises, but wilfully and knowingly disregarding his said duty in that behalf, and in contempt thereof, and craftily, subtly, fraudulently and maliciously intending to injure the plaintiff, did not, nor would while he so continued to be and was such mayor as aforesaid, and while such resolutions, determinations, instructions, requisition, direction and order of the said council continued to be and were in force and effect, nor upon the said time or occasion, nor upon such reasonable request as such mayor as aforesaid, so make or execute such lease in manner aforesaid; but on the contrary thereof, then and during all that time, wilfully and knowingly disregarding and in contempt of his said duty, and craftily, subtly, fraudulently and maliciously intending to injure the plaintiff, did wilfully, knowingly, fraudulently and maliciously wholly neglect and refuse so to do.

2nd count. *And*, whereas also, after the happening and occurrence of the said several matters, facts and occurrences in the introductory part of the first count mentioned, and while the defendant continued to be and was mayor as aforesaid, to wit, on the fifteenth day of April 1851, the said council therein mentioned did instruct, require and order the defendant as such mayor as therein mentioned, to make and execute the contemplated lease therein mentioned in manner and form therein mentioned, and thereupon it then became and was the duty of the defendant as therein mentioned, so long as therein mentioned and upon such request as therein mentioned, as such mayor as therein mentioned, to make and execute such contemplated lease therein mentioned in manner and form as he was instructed, required, directed and ordered by the said council as therein mentioned; and the plaintiff says that afterwards and before the commencement of this suit, while the defendant continued to be and was such mayor as aforesaid, and while such instruction, requisition, direction and order of the said council continued to be and was in full force and effect, on another and different time and occasion than the time and occasion in that behalf in that count mentioned, and at a time and on an occasion when the defendant could with propriety and conveniently as such mayor as aforesaid, have so made and executed such contemplated lease in manner and form as he was directed by the said council as aforesaid, to wit, on the fifteenth day of April 1851, the plaintiff did reasonably request the defendant as such mayor as aforesaid so to execute such contemplated lease; yet the defendant, well knowing the premises, but wilfully and knowingly disregarding his said duty and in contempt thereof, and not acting or intending to act in his said capacity of mayor as aforesaid, or officially—but unofficially and in his private and individual capacity, fraudulently and maliciously intending to injure the plaintiff while he so continued to be and was such mayor as aforesaid, and while such instruction, requisition, direction and order of such council continued to be and was in full force and effect as aforesaid, and upon such last mentioned time and

occasion, and upon such last mentioned reasonable request, did then wilfully, knowingly, fraudulently and maliciously wholly refuse as such mayor as aforesaid to make or execute the said contemplated lease, and the same then and thenceforth was and continues to be, and is wholly unmade and unexecuted : whereby and by means of the premises the plaintiff has wholly lost and been deprived of the use, benefit and enjoyment of the said lands and tenements for the contemplated term aforesaid, and also has wholly lost the benefit which he might and would otherwise have received from the contemplated covenants to him to be contained in the said contemplated lease, and also the said divers large quantities of building materials, goods, chattels and effects purchased, obtained, carried unto, and deposited upon and adjoining to the said lands and tenements by the plaintiff as aforesaid, of the quantity, quality, description and value aforesaid, and every part thereof became wholly valueless and useless to the plaintiff ; and also the monies in that behalf expended by the plaintiff as aforesaid became wholly lost to the plaintiff ; and also the matters and things for which the debts and liabilities which the plaintiff has contracted as aforesaid to the amount aforesaid, have become wholly useless to the plaintiff, and he hath been and is much prejudiced, injured, and damnified to the damage of the plaintiff of four hundred pounds ; and therefore he brings his suit, &c.

Demurrer for the following causes—that is to say, that there is not in all or any of the counts of the said declaration any contract or agreement shown by or on the part of the said council of the said town of Brantford, to make the said lease or demise the said lands to the plaintiff, nor any contract between the said council and the plaintiff in regard to the said demise or lease, nor any contract therefor under the common seal of the said council, nor any consideration on either part therefor, nor any mutuality of agreement or obligation between the said council and the plaintiff ; and that therefore the plaintiff could not, by reason of the defendant having refused to execute the said lease, have sustained any damage or suffered any wrong or injury for which he can maintain an action, and cannot complain

that the defendant refused to execute the lease which the council had not contracted or agreed, and were not bound to make or grant, and that the several alleged breaches of duty by the defendant are not such breaches of duty as the plaintiff has any right to complain of; and the facts stated in the said declaration do not support the plaintiff's action and do not shew that the plaintiff has any ground or right to charge the defendant with the breaches of duty alleged in the said declaration. And also, that it is not shewn in the said declaration or in any of the counts thereof what estate or interest the said council of the town of Brantford held or possessed in the said land, nor whether the said council had any estate or interest therein so as to enable them to make the said demise to the plaintiff: also, that it is not stated or shewn in or by the said declaration that the said order and resolution of the said council to demise the said land to the plaintiff, and the said order and resolution to grant the said lease thereof to the plaintiff, were or that either of them was authenticated by the common seal of the said council or by the signature of the head thereof as by law required, and that it is not shewn that the said council had any power or authority to make such orders and resolutions, and that the declaration is in other respects uncertain, informal and insufficient.

Joinder in demurrer.

Freeman, for the demurrer, contended that the facts did not constitute a ground of action.

That no binding contract upon the corporation to give a lease was alleged, and yet an action on the case was brought against the mayor for not sealing one.

That it was an attempt to evade the Statute of Frauds, or the necessity for a contract under the seal of the corporation, by suing the head of the corporation personally for not doing what, if a valid contract existed, would be a breach of agreement by the corporation.

That a right of action against the corporation must be proved in writing, under seal; whereas the present action, if maintainable, might be proved by parol—contrary to all principle.

That case may lie for some breaches of duty, though arising from contract, but not where it sounds purely in contract, as it does here, and involves no duty by reason of the profession of the party or the nature of the transaction, and that the present was not of the latter kind.

That if any breach of duty had been committed towards the plaintiff, it was by the corporation, to whom the defendant was responsible.

That he was not responsible to the plaintiff, and that there was no privity to create a duty for breach of which the action can be maintained.—*Elsee et al. v. Gatward*, 5 T. R. 143; *Daly v. Thompson*, 10 M. & W. 309—the officer was sued in place of the corporation per statute; *Barry v. Arnaud*, 2 P. & D. 633, 10 A. & E. 646, S. C., Trin. 11 Vic.

That the corporation not being liable, the defendant was not,—and if they were liable he could not be; so that either way the case failed.

That if there be a remedy, and no other remedy, a mandamus would be the only course; but that the right to no remedy could accrue without a binding contract and obligation on the corporation to be performed through the medium of their seal, affixed by the defendant, as their instrument, to execute the same.

Martin, for the plaintiff, contended that power in the corporation to demise was alleged in the declaration, distinctly shewing that they were entitled to grant a lease and that the plaintiff was competent to take one.

That the estate in the lands mentioned was in the inhabitants or corporation, but the power to dispose of it, by demise or sale, reposed in the municipal council or managing body.

That to enable the council to enter into executory contracts, or to execute them, the mayor, or head officer, should fulfil and give effect to the resolutions of the council by applying the seal when directed or required so to do.

That the statute 12 Vic., ch. 81, sec. 198, was peremptory on this head—that he is entrusted with the seal for that very purpose.

That inducement or facts, not within the plaintiff's

knowledge peculiarly, in the declaration, does not require the same precision as that part which contains the gravamen of the action, which meets one part of the opposite council's argument in this case.—*St. John v. Moody*, 2 *Leo*, 148 ; *Rider v. Smith*, 3 *T. R.* 768 ; *Johnston v. Reesor et al.* 10 *U. C. R.* 102 ; *Moore et al. v. The Great Western Railway Company*, *lb.* 251.

That less particularity was required in case than in *assumpsit* and less in declarations than in pleas, &c.

That it was the duty of the defendant to execute a lease in compliance with the resolution or order of the municipal council—*St. 33 Hen. VIII*, ch. 27.

That for breach of such duty case lies against him at the suit of the party aggrieved by his non-compliance.—*Longridge v. Levy*, 2 *M. & W.* 519, 4 *lb.* 337, *S. C.* ; *Bull. N. P.* 73 ; *Searé v. Prentice*, 8 *East.* 348 ; *Slater v. Baker, et al.*, 2 *Wil.* 359 ; *Pippin and wife v. Sheppard*, 11 *Price* 400 ; *Gladwell v. Steggall*, 5 *Bing. N. S.* 733 ; *Coggs v. Barand*, 2 *Ld. Ray.* 909.

That the statute casts on defendant the duty to seal all orders or by-laws of the council, and that for not doing so any party interested and injured may maintain case against him for the breach of such duty.—*Bogg v. Pearce*, 20 *L. J. C. P.* 99 ; *S. C.* 10 *C. B.* 534 ; *Collett v. London Railway Co.*, 20 *L. J. Q. B.* 411 ; *Boorman, et al., v. Brown*, 3 *Q. B.* 511 ; *S. C.* 11 *C. & F.* 1 ; *Courtenay v. Earle*, 15 *Jur.* 15 ; *S. C.* 20 *L. J.*, *C. P.* 7 ; *S. C.* 10 *C. B.* 73.

The following cases were also referred to in the argument:—*Schlencker v. Moxey*, 3 *B. & C.* 789 ; *Burnett v. Lynch*, 5 *B. & C.* 609 ; *Hancock v. Caffyn*, 8 *Bing.* 358 ; *Jackson v. Cobbin*, 8 *M. & W.* 790 ; *The Queen v. York*, 2 *Q. B.* 847 ; *Barber v. Harris*, 9 *A. & E.* 532 ; *The Mayor, &c., of Lichfield v. Simpson*, 8 *Q. B.* 65 ; *Bowen v. Morris*, 2 *Taunt.* 374 ; *Kennedy v. Gouveia*, 3 *D. & R.* 505 ; *Barry v. Arnaud*, 8 *Q. B.* 595, in error ; *Reg. v. Paramore*, 10 *A. & E.* 286 ; *Cane v. Chapman*, 5 *A. & E.* 647—the clerk was sued in case for a breach of duty by the commissioners.

MACAULAY, C. J.—The prov. stat. 12, Vic. ch. 81, sec. 96, enacts that “all by-laws shall be authenticated by the seal of the corporation and signed by the head,” &c., and “all debts, bonds, obligations and other instruments to be executed in behalf of any corporation erected, &c., by, or under this act, shall be valid if sealed with the seal of the corporation and signed by the head of such corporation, or by such other person as shall by any by-law, to be passed in that behalf, be authorised to sign the same on behalf of the corporation.”

Sec. 168.—All votes, resolutions and proceedings of meetings of the municipal corporations shall be carried by a majority of votes of the persons composing such meeting, &c.

Sec. 61.—Confers upon incorporated towns the same corporate powers as incorporated villages.

Sec. 52.—Confers on incorporated villages the same powers as townships; and by sec. 31, the municipality of each township may make by-laws for the purchase and acquirement of all such real and personal property within the township as may be required for the use of the inhabitants thereof, as a corporation, and for the *sale and disposal* of the same when no longer required.

This case is rested upon the duty of the defendant towards the plaintiff to seal the contemplated lease.

The difficulty is to perceive such duty as a legal obligation upon the defendant towards the plaintiff.

The plaintiff shews no binding contract upon the corporation to grant him such a lease—if such an agreement existed he might sue the corporation thereon. The present action is an attempt to make the defendant liable because he will not do what is necessary to bind the corporation to a demise for years renewable, without any previous contract therefor.

The declaration states the names of those who were the members of the town council, and that they had met and were in session—not alleging that the defendant was present or presiding, unless impliedly—and that being in session the council did consent, resolve and determine to demise to the

plaintiff and in the terms set forth, and that he was willing and offered to accept, &c.; and that the said council while in session, and defendant being mayor, did instruct, require, direct and order him as such mayor, for and on behalf of the council, and in the name of the council and under the common seal thereof, to make and execute such lease, of which he had notice, and which he was requested, but maliciously refused to do.

No previous by-law for granting such demise is alleged; and the mere resolution and order of the council, without being sealed or signed, (sec. 198) would not be a valid by-law to bind the corporation.

Then the question is, whether a resolution of the council, (assuming it to be properly passed by a majority present at a session regularly held) that a lease in the terms set forth should be granted, and that the mayor should, on their behalf, seal and sign it, gives a right of action on the case to the intended lessee, upon the mayor's refusal so to seal and sign. I think not. No duty to do so arose as between the defendant and plaintiff, however it might have been as between the defendant and the other members of the municipal council.

The resolution of the council does not in itself constitute a contract, if it did, the plaintiff might sue thereon; nor could it be contended that the other members present and concurring therein incurred any personal obligation to the plaintiff, whereby he could maintain an action against them as for a breach of duty in not causing or procuring the seal of the corporation to be affixed to the lease or had they afterwards rescinded the resolution, as they might have done; and there is a more direct connexion between the plaintiff and such members, than between him and the defendant.

The council might revoke the resolution before the seal was attached in execution thereof; and yet the present action would hold the defendant liable notwithstanding, if before such revocation he had refused to give effect to the resolution by sealing the lease.

It appears to me an attempt to sustain an action, as for a breach of duty against the head of a municipal corporation for not applying the seal to make a contract between the corporation and the plaintiff, founded upon a refusal which, if there had been a previous contract, would have constituted a breach thereof. That the effect would be to afford a remedy against the head of the corporation, in the absence of a binding contract on the corporation, equivalent to a remedy on the contract against the corporation, had it been duly made, and so to substitute a resolution for a contract, as a sufficient foundation for an action against the mayor individually, as a valid contract might be for an action against the municipality had a valid and binding contract been duly entered into.

It would render the resolution of the council sufficient to create a vested interest in the plaintiff, which could only be properly created through the medium of the seal, and to make inchoate executory steps towards a contract to confer a right to have the contract completed at the peril of an action at law, as for a breach of duty against whatever officers of the corporation might refuse to go on with the additional proceedings necessary to create such contract.

I do not find what I feel warranted in adopting as authority for such a rule.

The proper course, if any, seems pointed out in *Reg. v. Kendall*, 1 Q. B. 366 to 387.

McLEAN, J., concurred.

Per Cur.—Judgment for demurrer. (a)

(a) *Henley v. Mayor of Lyme*, 5 Bing. 107; *Avery v. Cheslyn*, 3 B & Adol. 77; *Jenk.* 117, Case 83, end of the case; *Perring v. Harris*, 2 Moo., & Rob. 5; *Robinson v. Gell*, 10 Am. Eng. 502, 21 L. J. C. P. 155; *The Birkenhead, Lancashire and Cheshire Junction R. C. v. Pilcher*, 5 Ex. R. 24, 1 Am. Eng. R. 493; *Schimat v. Brunsted*, et al., 6 T. R. 646; *Lacon et al. v. Hooper*, et al. 6 T. R. 224; *Peter v. Kendall*, 6 B. & C. 703; *Lane v. Cotton*, 1 Sal. 17; *Rex v. Vice Chan. of Cambridge*, 3 Bur. 1663; *Ward v. Bird*, 2 Chit. R. 582.

SAMUEL GASS OGDEN V. THE MONTREAL INSURANCE CO.

Insurable interests—Mortgagee.

The holder of a chattel mortgage, being mortgagee, has an insurable interest, though the mortgagor continues in actual possession of the goods mortgaged.

The omission of a mortgagor, in effecting an insurance in the name of the mortgagee, to mention the *amount* of the mortgage, does not render the policy void.

Where the mortgage was one under seal and the mortgagee insured before default: *Held*, that he was not entitled to recover on his policy more than the amount appearing on the face of his mortgage at the time of insurance—not being allowed to tack subsequent advances, by parol.

In this case the interest of the mortgagee was only £184 5s. 10d., though he insured for the £500. Having recovered a verdict for the £500, on motion against it, the court ordered the verdict to be set aside unless the plaintiff would elect to reduce the verdict to the £184 5s. 10d., the amount secured on the face of his mortgage.

Writ issued 5th April 1853—declaration 14th April 1853.

ASSUMPSIT—*Declaration* stated that whereas, to wit, on the 18th December 1852, by a deed poll or policy of insurance then made, sealed with defendants' seal, signed by three directors and countersigned by the secretary and manager of the defendants (of which plaintiff made profert), after reciting that plaintiff had paid the sum of £8 15s. to defendants, being the premium on £500 assessed by said policy to the 20th December 1853, upon the property therein described, in the place therein stated, against loss or damage by fire—that is to say, on marble slabs and monuments valued at, as a general stock, £750—in a wooden building, the property of N. R. Leonard, and occupied by Wm. C. Ogden, and situate on the west of Yonge street, &c. : the defendants covenanted with plaintiff, &c., that their stock and funds should be liable to pay, &c., to plaintiff, his heirs, executors or administrators, all such loss or damage as should happen by fire to the said property so insured from the 20th December 1852, for twelve months next ensuing, not exceeding £500—with a proviso excepting loss or damage by fire by foreign invasion, &c., and providing that the said policy, &c., should be subject to the conditions contained in the printed proposals of defendants, a copy of which was printed on the back of the said policy, which conditions are then set forth, but of which it is necessary to state here only the following :

1st. "And if any person or persons shall insure his, her or their buildings or goods, and shall cause the same to be described otherwise than they really are to, the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force."

2nd. "Goods held *in trust* or on commission are to be insured as such, otherwise the policy will not extend to cover such property; but they may be classed with the person's own stock in trade without a separate valuation."

8th. "Lease-holders, trustees, *mortgagees*, and reversioners, as well as landlords, may insure *their interest in buildings, provided the nature of the tenure or interest be duly specified.*"

11th. "All persons assured by the said company sustaining any loss or damage by fire, are forthwith to give notice to the company, at their head office in Montreal, or to their authorised agent; and as soon as possible thereafter, within thirty days at farthest, to deliver in as particular an account of their loss *or damage*, signed with their own hands, as the nature of the case will admit of. In this account the property and articles must be specified in detail, with the quantities, qualities and prices, and they shall accompany the same with their oath or affirmation, and make proof of the same by their books of account and other proper vouchers as shall be reasonably required, &c., shewing, &c., when and where the fire originated so far as they know or believe, &c."

"And if their appears to be any fraud, overcharge or imposition, or any false swearing, the claimant shall forfeit all claim to restitution or payment, &c. *If required*, the assured shall produce a certificate under the hand of one or more magistrates, sworn before a notary or clergyman of the city, &c., in which the fire happened, importing, &c., as therein specified, &c."

12th, related to referring claims to the valuation of arbitrators, when no fraud is suspected and differences arise with respect to the amount of the loss, &c.

The plaintiff then averred that at the time of making the said deed or policy of insurance, and from thence until the loss or damage afterwards mentioned, he was interested in the said goods, &c., in the said policy mentioned, to a large amount, to wit, the amount of £500; and that the said goods, &c., afterwards, to wit, on the 1st January 1853, were burnt, consumed and destroyed by fire in the place where the same were situated, &c., negating such loss by invasion, &c. or by reason of anything provided against or prohibited by any of the conditions indorsed on said policy; and by such fire the plaintiff sustained loss to a large amount, to wit, the said sum of £500. It then denied insurance in any other company, and averred that the goods and premises were correctly described, and not otherwise than they really were, to the prejudice of the defendants; and that the plaintiff did not misrepresent or omit to communicate any circumstance which was material to be made known to the defendants, in order to enable them to judge of the risk they had by the said policy undertaken, &c.; and that the plaintiff gave due notice thereof to William Kiscock, the defendants' agent at the city of Toronto; and also, as soon after as possible, and within thirty days next after the said loss or damage, to wit, on the 20th January 1853, did deliver to the said Kiscock, then being such agent, &c., as particular an account of the said plaintiff's loss or damage, signed with his own hand, as the nature of the case would admit of, stating in detail the property and articles so burnt and consumed, with the quantities, qualities and prices; which said account was verified by the oath of said plaintiff, &c., shewing also when and where the said fire originated so far as the plaintiff knew or believed, and averred readiness to have made further proof if required. It then averred that although he paid the premium, &c., of £8 15s. and conformed in all things, &c., yet defendants had not paid him or made good his said damage and loss in any part, but the whole remained unpaid, contrary to the said deed poll or policy of insurance and of defendants' covenant, &c., and so defendants had not kept their covenant, &c., to plaintiff's damage of £500.

Pleas.—1st. That the said deed or policy of insurance in the declaration mentioned and the execution thereof, was obtained from the defendants by the fraud, covin and misrepresentation of plaintiff and others in collusion with him : verification.

2nd. That plaintiff was not before or at the time of the said supposed damage or loss, &c., interested in the said goods, &c., in the said deed or policy mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff had in the said declaration alleged : to the country and issue.

3rd. That the said goods were not, nor were any or either of them, or any part thereof, burnt, consumed or destroyed, by fire, in manner and form as plaintiff had complained thereof against defendants : to the country and issue.

4th. That plaintiff did not at any time within thirty days next after the happening of the said loss and damage, deliver to the said William Kissock, or to defendants, or to any agent of theirs, any particular account of his the said plaintiff's loss or damage, signed or verified as above alleged of the property or articles so burnt or consumed, with the quantities, qualities or prices, in manner and form as the plaintiff had in that behalf alleged : to the country and issue.

5th. That at the time of the effecting the said assurance and the execution by defendants of the said policy, the plaintiff did fraudulently and falsely state to defendants, as part of the material information on which they consented to execute and did execute the said policy, that the plaintiff was interested in, as owner of, the said goods and chattels so covered and assured by the said policy, to the full amount of the said sum of £500, so assured therein as aforesaid ; whereas in truth and in fact, at the time of making such statement and of effecting such assurance and of executing such policy by defendants, the plaintiff was only interested in the said goods and chattels to a much less sum than the said sum of £500, so to the sum of (quære, to wit) £200, as holding a certain mort-

gage or lien thereon to secure a certain debt claimed to be due to him by one William Ogden, the real owner thereof, to the amount of £200 and no more ; and that at such time the plaintiff had no greater or other interest or property in said goods and chattels, or any part thereof, than the said sum of £200 ; and which false and fraudulent statement was a misrepresentation of facts material to be known to defendants, and an omission to communicate facts material to be known to defendants, to enable them to judge of the risk they were undertaking, and that such policy of assurance was and is therefore void and of no force : verification.

Replication, similar to the pleas, concluding to the country.

Replication to 1st plea—That the said deed poll or policy of assurance was not, nor was the execution thereof, obtained from defendants by the fraud, covin or misrepresentation of plaintiff, or of any other person or persons in collusion with him, in manner and form as in the said plea alleged : to the country and issue.

Replication to last plea—That defendants, of their own wrong and without the cause alleged in the said plea, committed the said breach of covenant in manner and form as plaintiff hath in his said declaration alleged : to the country and issue.

At the trial evidence was given with reference to the several issues joined.

The first and fifth issues involved the imputed fraud.

The second—the plaintiff's interest in the goods.

The third—their loss or destruction.

The fourth—the due notification thereof.

As to the third, there was evidence of loss and damage to the amount insured, though conflicting.

The principal questions arose under the 1st, 2nd and 5th issues, which may be taken together.

1st. With respect to the plaintiff's interest in the goods, and the alleged fraud, misrepresentation or concealment :

The plaintiff called his son *William Cyrus Ogden*, who stated that he was a marble dealer in the city of Toronto in partnership with one VanAntwerp, but that they had

dissolved between the 1st and 10th December 1852; that the marble in question in this suit was their stock in trade, and was after the dissolution retained by the witness as his sole property, and was at the place where it was insured and afterwards damaged by fire; that being in want of money the plaintiff, his father, was willing to advance a sum if secured by mortgage upon the marble, which was given. The mortgage was put in and admitted; it was by indenture bearing date the 13th December 1852, between the witness William C. Ogden of the city of Toronto, marble manufacturer, and Samuel G. Ogden of the township of Toronto, yeoman, whereby, in consideration of £184 5s. 10d., the party of the first part granted, bargained, sold and assigned unto the said party of the second part, all the stock of marble in the rough and finished state in the said marble factory, &c.; also all the tools, implements and machinery, &c., belonging to the said party of the first part; also one span of bay team horses, one bay horse, two sets of harness, a waggon, a buggy, two stoves and pipes, a bureau, one bedstead and bedding, one clock, three looking-glasses, three chairs, one hundred bushels of oats, one ton of hay, and two carpets; to hold for ever, redeemable upon payment by the said mortgagor to the said mortgagee of £184 5s. 10d., with interest from date, on or before the 13th December 1854, with covenants warranting the title, for payment of the money and against selling without license in writing, &c.; but nothing was therein contained respecting insuring.

Annexed thereto was an affidavit of the plaintiff, sworn the 13th December 1852, that the mortgagor was justly and truly indebted to him in the sum of £184 5s. 10d., and that the bill of sale by way of mortgage was executed in good faith to secure the payment thereof, &c.

The execution thereof was sworn, and the same was filed with the clerk of the county court on the same day.

Upon the subject of the insurance of this marble the evidence was conflicting. It was represented by the mortgagor (plaintiff's son) that there were other dealings between him and his father; that the father had become security for the

son to two or three other persons ; and that the son owed his father upon promissory notes for going security for him, for money laid out in the purchase of the goods in question, and for things he had got from him—teaming, lumber, flour, &c. That the mortgage was for money received at different times, of which he had made up an account of £184 5s. 10d.; but that the whole of their dealings amounted to £442 and upwards that the son owed his father. That the plaintiff had gone security for his son in March 1852 by a note to King for £100, and had become responsible to one Kelly for £50, though since paid ; and that there were other outstanding liabilities not included in the mortgage, but due and omitted, as not being deemed necessary to be inserted for his security.

That the arrangement was that the plaintiff would get the property insured to secure his amount, and if anything happened that he was to pay himself and pay the remainder to his son. That the subject of insurance was mentioned before the mortgage, and £500 was to be the sum, and that such arrangement was made a few days before the mortgage was executed.

That the son took advice, and was informed the amount of the mortgage was immaterial as respected the sum to be insured. That ultimately he insured at £500 for the joint interest of himself and plaintiff.

That William Kissock, who was the defendants' agent, came into the mortgagor's shop and asked him if he did not wish to insure ; that this was some time before he insured, and that he said he did, upon which the agent invited him to insure with the defendants.

That he the mortgagor afterwards, on the 20th December 1852, went to such agent at his office in Toronto, and told him he had come to insure the marble shop he had a short time before spoken of insuring ; that he wished to insure it for £500 in the plaintiff's name as being mortgagee. That the agent said he thought it was the mortgagor's, who replied that it was the plaintiff's by mortgage, and that he (mortgagor) wished to insure the plaintiff's interest and his own to the amount of £500 in his own name, to secure

him first, and, if any thing remained, then the mortgagor. That he did not say the plaintiff owned the property, but told the agent he had a mortgage, not mentioning the amount nor being asked what it was.

That he, the mortgagor, signed the application produced, which was filled up by Kissock the agent, and he then paid the premium. The application was a printed form, with the blanks filled up in writing. It was addressed to the defendants, and headed "orders for fire insurance," and containing in different columns—that it was to commence on the 20th December 1852, for twelve months; that the assured was Samuel Ogden, Toronto township, yeoman; the property, marble slabs and monuments, valued at as a general stock £750, in a wooden building the property of N. R. Leonard, occupied by William C. Ogden, marble dealer, the situation of the building being on the west side of Yonge street, &c., sum insured £500, rate per cent. 35s., amount £8 15s., signed Samuel G. Ogden, by William C. Ogden, with a sketch shewing the situation of the building on Yonge street, &c.

The policy, under the seal of defendants, was also put in. It bore date the 28th December 1852, described the property insured and its situation as in the application, and expressed that the marble was insured until the 20th December following. It corresponded with the declaration as therein described, with the conditions indorsed in print.

On the other hand, Mr. Kissock, the defendants' agent, represented,—that he did not go to the mortgagor, but met him casually, when he said to the agent that he wished him to insure, and was told to call. That he called on the 20th December, when the agent filled up the application under his instructions; that being asked why he insured in his father's name, he said he had sold out to him; that being asked whether his father was going to carry on the business, he said no, that he was to continue it.

That the agent did not know the plaintiff, nor where he lived, but believed him to be the owner, and that he inserted the names and all put in the application as given by his son, who said nothing about a mortgage till after the fire. That

being asked how the plaintiff could sign it, the agent told the son he might do so as agent.

The agent stated that, if told the plaintiff was only mortgagee, he would have drawn the application differently, that is, in the mortgagor's name, to be assigned to the mortgagee for the amount of his interest; that the defendants desired to know the interest of parties insured, but that he would have insured in the name of the plaintiff's son, at the same premium, if told he was owner.

It was proved that a fire occurred on the morning of the 1st January 1853, by which the property insured was principally damaged and destroyed, and evidence was given that the extent of injury occasioned thereby was equal to £499 9s. 10d. There was a difference among the witnesses on this point also, but it is not material to be stated at length.

The mortgagor (plaintiff's son) alleged that the real value when insured was £750.

The damages were not estimated in mutual concert, and the plaintiff's son and Kissock differed in their statements respecting notice, &c.

He also stated, that he gave notice to the defendants. The documents were produced and admitted to have been given within the thirty days. They consisted of:

1st. The affidavit of plaintiff, sworn the 20th January 1853, that the several goods set forth in the schedule annexed, marked A., were destroyed in part and damaged in part, as therein stated, by fire, on the night of the 31st December or morning of 1st January last, in the premises on Yonge street in the city of Toronto in which the same were situated at the time they were insured by him in defendants' office in the city of Toronto; and that the said schedule contained, as he believed, a full and true account of the loss and damage *sustained by him by the said fire upon the said goods* so insured by him as aforesaid, and of the quantities, qualities and prices of the said goods so destroyed or damaged, and the amount of the said loss or damage thereon; and that, not being present at the fire, he could not set forth how it originated, &c., but believed it

was caused by accident and commenced in the premises adjoining, &c.; and that the whole amount of the loss and damage upon the said goods is £499 9s. 10d., as set forth in the said schedule, &c.

2nd. An affidavit of William C. Ogden, sworn the 21st January 1853, that the different sums set opposite the articles in the schedule annexed as the cost prices were the true first cost prices thereof, &c.; that he was present when the loss or damage was inquired into and estimated &c., by Scott & Cochrane, and that the loss and damage fixed by them was just and fair.

3rd. Affidavit of Peter Scott, sworn 20th January 1853, —that he and Cochrane, dealers in marble, &c., had carefully examined the goods, &c., and that the amount of damage or loss set forth in the schedule, was just and fair, &c., and amounted in all to £499 9s. 10d.

The schedule A. contained a list of various articles of marble, with cost prices and damages as alleged, as stated in the affidavits referring thereto. The remains were said to have been sold as damaged goods for £100, and the proceeds paid to the plaintiff's son.

• The plaintiff also gave evidence, through his son, of interviews, conversations and negotiations between him and James Manning (afterwards called as a witness for the defendants) after the fire, respecting his acting as agent for the insured in preparing the necessary papers, claiming the amount, and using his good offices to get the same or to compromise the claim on the best terms he could.

The defendants on the defence also gave evidence, through Messrs. Kissock and Manning, that a few days after the fire they went from the city of Toronto to the plaintiff, who lived near Cooksville in the township of Toronto; and that being asked what interest he had in the stock that was burnt, he said he had a mortgage on it for about £175, which might be seen at the registry office (which was the first the defendants' agent Kissock heard of it); that he had lost £50 by a former partner of his son, named VanAntwerp, or had a claim against him; but mentioned nothing else, nor any other claim: and they

said that he did not seem aware that any insurance had been effected on the property in his name, or if he did, that he said nothing about it. Both Kissock and Manning concurred in the above.

In the course of their evidence, and also that of the plaintiff's son, many questions were asked, and a good deal said, respecting interviews since the fire with the plaintiff's son, and what he had said and how he acted; but it is not important to be stated here.

Also respecting the motives and objects that induced Kissock and Manning to visit the plaintiff, as if to take him by surprise; but as such matters were rather calculated to affect the credibility of the witnesses with the jury, than immediately pertinent to the issues, their answers need not be here mentioned. Each exonerated himself from sinister motives.

It may however be proper to remark, that Manning was an insurance agent, and was agent for the Equitable Insurance Company, who had taken a risk upon the house in which the marble was insured, and on that account, independent of his intercourse with the plaintiff's son, interested in the subject matter of the fire, as he alleged.

It was at the end of the case agreed by the counsel on both sides, that the jury should decide the several issues upon the facts as found under the evidence—find for the plaintiff the whole amount claimed or the amount of the mortgage—with leave to the defendants to move a nonsuit if, on the issues and facts found, the plaintiff was not entitled to recover on the whole record either the full amount or the amount of the mortgage.

The jury found all the issues in succession in favor of the plaintiff, with £449 9s. 10d. damages; and in answer to questions put to them by the court, said that in their opinion the plaintiff's son did apprise the defendants' agent that the plaintiff was only a mortgagee and not absolute owner of the goods; that the plaintiff's son did owe him, and that he had other claims against him beyond the amount of the mortgage; and that it was agreed between them before the insurance was effected that such insurance

should extend to secure the plaintiff therein, in addition to the mortgage, to the amount of £440, and that the defendants' agent was apprised thereof: that as to any surplus beyond the plaintiff's interest or claims, the plaintiff was to be as a trustee for his son, and that the defendants' agent was apprised thereof; and that the plaintiff gave due notice, &c., of the first loss, as required by the policy; and that the loss sustained by the plaintiff, in the whole, amounted to £499 9s. 10d., for which sum they found for him with interest—the effect of the whole being, that the plaintiff's son and agent did not suppress any fact material to have been communicated to the defendants' agent, and to repel the fraud imputed.

In Easter Term last, *Hagarty*, Q.C., of counsel for defendants, obtained a rule upon the plaintiff to shew cause why the verdict should not be set aside and a non-suit entered, pursuant to the leave reserved; or a new trial be granted, on the grounds that such verdict was against law and evidence and the judge's charge, and for misdirection.

Dr. *Connor*, Q.C., shewed cause during the same term, and contended:

That the verdict and answers of the jury affirmed the plaintiff's case as strongly as the jury could express themselves; and that the evidence warranted such finding: that no fraud was proved or found—and the verdict cannot be impeached.—*Ellis on Insurance*, 7.

That the exceptions or conditions of the policy do not embrace a case like the present, or require a mortgagee to specify his interest, or preclude him from availing himself of the policy to protect and cover himself beyond the amount of the mortgage, or prevent his insuring for the joint benefit of himself and the mortgagor. That No. 8 of the conditions related only to insurance on buildings. *Irving v. Richardson*, 2 B. & Adol. 193; 1 Moo. & Rob, 153 S. C.; *Crowley and others v. Coheen*, 3 B. & Ad. 478; 1 Arnould on Insurance, 257.

That if in fact the plaintiff did insure for self and son, it ended the case, and was so proved and found. If not, that

still as mortgagee, with claims *dehors*, he is entitled to the amount *pro tanto*, and as trustee for the mortgagor for any surplus or residue.—Powles et al. v. Innes, 11 M. & W. 13.

That there is no difference between ships and goods—if there be, it is in plaintiff's favor; but the defendants' counsel gave up this point.

That the late statute requiring mortgages of chattels to be filed or registered relates only to the claims of debtor and creditor, and not to mortgagor and mortgagee, between themselves, and whose rights therefore remain as before.—Stockdale v. Dunlop, 6 M. & W. 224.

That the insured had a direct legal interest to the amount of the mortgage, and an equitable interest in the residue, and had paid the full premium.—Story's Equity Plg., sec. 134; Story on Bailments, secs. 304, 310, 348; Adams v. Claxton, 6 Ves. Jr. 228-9,—explaining Vanderzee v. Willis, 3 Bro. C. C. 21; and see Demainbray v. Metcalfe, 2 Vernon 691-698; ex parte Langston, 17 Ves. 227; Jones v. Smith, 2 Ves. 379.

That if plaintiff had an interest by parol beyond the mortgage, he might insure it, rather than the owner of goods insure profits, though an excrescence, as it were

He relied principally on the legal right of the mortgagee to insure for the joint benefit of self and mortgagor; but if that failed, then relied on the parol evidence of a specific agreement for an extended security or lien from his son to the plaintiff.—Sparkes v. Marshall, 2 Bing. N. S. 773; Caruthers v. Sheddon, 6 Taunt. 14; Sutherland v. Pratt, 12 M. & W. 16, 11 M. & W. 296 S. C.; Smith v. Lascelles, 2 T. R. 187; 1 Arnould, 251 chap., on Insurable Interests *passim*.

As to the evidence, he submitted, it was amply sufficient to establish the main facts essential to the support of the plaintiff's claim.—Watson v. Christie, 2 B. & P. 224.

Hagarty, Q.C., in reply, contended:

1st. That no case can be found warranting a person owning or being interested in goods to the amount of £200 to insure for £500—and shewing that he could recover.

2nd. That all the cases of mortgagees insuring for

mortgagors rest on satisfactory proof of the fact and the dicta of judges, and not upon such loose and intangible and unsatisfactory statements as were given in evidence to support this action.

That the plaintiff's son admitted he did not tell the defendants' agent the *amount* for which the goods had been mortgaged to the plaintiff; and *that* was a material fact, and the most material, if it was necessary to say anything about it; and that it was not sufficient for him merely to state in general terms that the plaintiff was a mortgagee, and so put the defendants' agent on *inquiry*; but therein is a *suppressio veri* and concealment, equivalent to a misrepresentation—the implication from what was said being that plaintiff was mortgagee for the full amount insured.

That it was a question for the jury whether a fact was or was not material to be mentioned, that they ought to have found the omission to communicate this fact material.—*Seaman v. Fonereau*, 2 Stra. 1183; *Lindenau v. Desborough*, 8 B. & C. 586; *Rawlins & Desborough*, 2 Moo. Rob. 328.

That the mortgagor's evidence was incredible, as representing the plaintiff as taking a mortgage for £184 5s. 10d., imputing some specific sum or balance, where he had unadjusted claims to a much more than double the amount—due upon money and note transactions, and the sale of flour, lumber, &c.—*Brown v. Gore Dist. Mutual Ins. Co.*, 10 U. C. R. 353—misrepresentation by mortgagees in fee—*Arnould on Insurance*; *Cornfoot v. Fowke*, 6 M. & W. 374; *Railton v. Matthews*, 10 C. & F. 594.

That even inadvertent omissions may prove fatal.—*Newcastle Fire Ins. Co. and Macmorran & Co.*, 3 Dow. Par. Cas. 255 (a).

That false statements may vitiate, though not in themselves material; that if material facts be stated or omitted, disregarding or thoughtlessly, it is equally fatal.—*Arnould* 494; *Seaman v. Fonereau*, 2 Stra. 1183—concealment; *Perry v. British Am. Ins. Co.* 4 U. C. R. 330—

(a) See *Richards v. Murdock*, 8 B. & C. 527.

concealment; *McFawl v. St. Lawrence Ins. Co.* 3 U. C. R. 59—concealment; *Fitzherbert v. Mather*, 1 T. R. 12—concealment; *Wainwright v. Bland et al.*, 1 M. & W. 32.

That one leading feature as to the evidence is, that the mortgagor—the plaintiff's agent in effecting the insurance—is the only witness to prove any additional interest in the plaintiff, and all rests upon his mere statement unsupported by any corroborative proof whatever, and who thereby was in effect proving his own interest, not only as being entitled to claim the surplus if any, but exonerating himself through the medium of the defendants' liability, if established by his testimony. In short, that he gave evidence in his own favor, as much or more than in the plaintiff's,—and the evidence given was of the most loose and vague description, and entitled to no credit to affect the defendants in the degree attempted.

The following references to American decisions were made at the close of the argument:

Carpenter v. Providence Ins. Co., 16 Peters 425, 496; *Col. Ins. Co. v. Roberts*, 2 Peters 25; *Gilbert v. N. A. Fire Ins. Co.*, 25 Wend 43; *Traders' Ins. Co. v. Roberts*, 9 Wend 404.

Also to *Ellis on Insurance*, 21; *Phillips Ins.* 41, 64, 94; 2 *Marshall Ins.* 7, 8, 9.

Lucena v. Crauford et al., 3 B. & P. 75, 1 Taunt. 325 S. C.; *Park on Insurance*, 179; were also referred to.

MACAULAY, C. J.—Upon the whole, I think there should be a new trial, unless the plaintiff consents to reduce the verdict to the amount of the mortgage on the face of it with the interest.

1st. On the defence there was evidence given calculated to shew that the plaintiff was ignorant of the existence of the policy of insurance in his favor—in which event it could not, as stated by his son, have been contemplated and understood before the mortgage was made. But this seem immaterial, since, being made for the plaintiff's benefit, it was competent to him to adopt it, even after the fire, although previously ignorant of its existence.—*Lucena v. Crauford et al.*, 3 B. & P. 75, 91, S. C. 2 N. R. 209, 313,

S. C. 1 Taunt. 325; Routh v. Thompson, 13 East. 274; Hogedorn v. Oliverson, 2 M. & S. 485; Wolff v. Horncastle, 1 B. & P. 525; Bell et al. v. Janson, 1 M. & S. 203.

2nd. I find no authority for holding that the omission by the mortgagor, in effecting the insurance in the name of the mortgagee, to mention to the defendants' agent the amount for which the mortgage had been given was an omission or suppression of a fact so material to have been communicated that it renders the policy void. The mortgagor states in evidence that he did apprise the defendants' agent that the plaintiff was only a mortgagee; and, though contradicted by the agent on this point, the jury have found that such communication was made. If so, it was sufficient to set the agent upon inquiry; and the cases seem to show that if the insured has an insurable interest in the property that is sufficient, although the nature of such interest be not declared or inserted in the application or policy.—Geach et al. v. Ingall, 14 M. & W. 95; Crowley et al. v. Cohen, 3 B. & Adol. 478; Carruthers v. Sheddon, 6 Taunt. 14, 1 Mar. 416.

3rd. But to warrant the insurance of goods against loss by fire, as well as against loss by the dangers of navigation while on board ships or vessels, the insured must have an insurable interest therein, and which interest must be legal or equitable.—Marshall on Insurance, 113, 739; Yollop ex parte, 15 Ves. 67-8, Houghton et al. ex parte, 17 Ves. 253; Ellis on Insurance, 22; Hill v. Secretan, 1 B. & P. 315; Wolff v. Horncastle, Ib. 316; Camden v. Anderson, 5 T. R. 709; Honson v. Blackwell, 4 Hare 434.

Mortgagees and mortgagors have insurable interests—the mortgagor to the full value of the goods or property insured, the mortgagee to the amount of the sum secured by the mortgage, at all events.—Glover v. Black, 1 Bl. R. 396; Robertson v. Hamilton, 14 East. 529, 593; Cranford v. Hunter, 8 T. R. 16, 17; 1 Arnould on Insurance, 251, 257, 494; Phillips on Insurance, 41, 64, 94; Stockdale v. Dunlop, 6 M. & W. 224; Powles v. Innes, 11 Ib., 10, 11.

4th. The necessity for an insurable interest has been occasioned by various statutes passed with a view to check

wagering and blank policies. Of these acts, some relate exclusively to ships and goods or merchandize, &c., adventured on ship-board to be water borne, others to insurances on lives or other events—and they deserve careful attention in this case.

The first material to be mentioned is the 19 Geo. II., ch. 37, to regulate insurance on ships, &c., or effects laden therein. This act did not require the name of the party interested to be stated in the policy; but it prohibited assurances upon any ship, &c., or effects laden on board thereof, &c., interest or no interest, or without further proof of interest than the policy, &c.

The next, and perhaps most material in the present case, is the 14 Geo. III. ch. 48, for regulating insurance upon lives, &c. It recites the mischievous kind of gaming introduced by insurance on lives or *other events* wherein the assured had no interest; and enacts that no insurance should be made by any person, &c., on the life of any person, &c., or *on any other event or events whatsoever*, wherein the person, &c., for whose use, benefit, or on whose account such policy, &c., should be made, should have no interest, or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning thereof should be null and void to all intents and purposes whatsoever. Also (by sec. 2) that it should not be lawful to make any policy or policies on the life or lives of any person or persons, *or other event or events*, without inserting in such policy or policies the person's or persons' names and interest therein, or for whose use, benefit, or on whose account such policy was made, &c.; and (by sec. 3) that in all cases where the insured had interest in such life or lives, *event or events*, *no greater* sum should be recovered or *received* from the insurer or insurers than the amount or value of the interest of the insured in such life or lives *or other event or events*: provided (sec. 4) that nothing therein contained should extend to insurances *bona fide* made by any person or persons on ships, *goods or merchandizes*; but every such insurance should be as valid and effectual in law as if the act had not been made.

the said dam, and then, *vi et armis*, drove and forced away all the water by means of the said dam raised as aforesaid ; and then, *vi et armis*, seized and took divers of the said plaintiff's saw-logs, &c., to wit, &c., and cast, pushed, knocked and threw about and injured the same, and carried away the same, and converted and disposed thereof to their own use, &c.

8th plea to fourth count generally—that the said Boston Creek was a stream down which all persons had a right to float saw-logs ever since the passing of the statute 12 Vic. ch. 87, during autumn and spring freshets ; and that at the said several times when, &c., all persons were by the said act authorised to float logs down the said stream at the part mentioned in the said fourth count ; and that the said times when, &c., were during the fall freshet of the year 1852, and while there was sufficient water in said stream to float the said logs, and that (persons named) had a large number of saw-logs lying in the water of the said stream just above the said easement of plaintiff, which had floated down the said stream, and defendants, being employed by the said persons to float the said logs from where they were to their mill on the Grand River, into which the said stream naturally flowed, did at the said times when, &c., for the purpose of separating the said logs from others then lying in the said stream, and directing and driving the aforesaid logs, enter into and upon the said stream called the Boston Creek—it being necessary for the defendants so to do, there then being on each of said days and times an autumn freshet and sufficient water in the stream to float the said logs, doing no unnecessary damage to plaintiff, &c.

9th plea to fourth count—As to the breaking, demolishing, injuring and destroying the said dam therein mentioned, and driving, forcing away and drawing off the water in the said fourth count mentioned, and seizing and taking the said logs of plaintiff therein mentioned, and casting, pushing, knocking about and injuring the same, that before, &c., to wit, the last day of October 1852, certain persons (named) owned a large number of saw-logs, which had been floated

down the said stream, upon and across which the said dam had been and was erected and being, were in the said stream a little above the said dam; and that defendants were employed by such owners to float the same from where they were to their mills on the Grand River, into which the said stream flowed. And defendants proceeded to justify, as in the 4th plea to first count, as to pulling up one log and one stick of the dam, whereby a small portion of the water escaped, and the said logs of plaintiff were a little pulled and pushed about, and the said dam was slightly damaged—doing no unnecessary damage, &c.

10th plea to fourth count—As to the breaking, &c., as in the introduction of last plea, that the said dam was built and erected at the said times when, &c., was standing upon and across the said stream, called the Boston Creek; and that certain persons (named) and divers others, the owners of saw-logs, had for a long time before the act 12 Vic. c. 87, and at divers times, &c., floated saw-logs, lumber and other timber down the said stream at high-water, and that there was not at the said several times when, &c., any apron, slide, &c. Defendants then justified as in 4th plea to first count. (a)

Replications to 8th plea—That after breaking and entering the said several easement in the said fourth count mentioned by defendants, &c., as by them alleged, defendants, *vi et armis*, broke, demolished, injured and destroyed the said several easement of plaintiff, in manner and form as by the plaintiff alleged in said fourth count. Verification.

Replication to 9th plea—That after committing the trespasses in that plea recited, defendants, *vi et armis*, broke, demolished, injured and destroyed the said several easement of plaintiff, in fourth count mentioned, *modo et forma* alleged, &c. Verification.

Replication to 10th plea—That after, &c., defendants, *vi et armis*, broke, demolished, injured and destroyed the said several easement of plaintiff, &c.

Demurrer to replications to 8th, 9th and 10th pleas, on

(a) Ante page 530.

the same grounds assigned for cause of demurrer to the replications to 6th and 7th pleas. (a)

Plaintiff gave notice of objections, as on general demurrer to these pleas, similar to those noticed in the demurrer book as to the 6th and 7th pleas, viz. :

1st. Do confess, but do not avoid, &c.

2nd. Not a sufficient answer in law to the matter which pleaded.

3rd. Same grounds as those objected to the 4th plea.

Upon the argument, *Martin*, for the plaintiff, contended :

1st. As to the pleas to the 1st count, that they profess to answer the whole count, but only answer a part ; that the word "stream" was of uncertain import ; that they do not shew whether it is a navigable river and public highway, or only a private water course.—*Mayor of Salford v. Ackers*, 16 M. & W. 88.

2nd. That the dimensions or description of the stream as to capacity were not shewn, so as to bring it within the statute 12 Vic. ch. 87 sec. 1—see last proviso.—*Lafferty v. Stock*, 3 U. C. C. P. 20 ; *Moore v. Great Western Railway Co.*, 10 U. C. R. 250.

3rd. That no proper notice was averred, though necessary when the party in possession did not erect the dam, as in the plaintiff's case.—*Lord Lonsdale v. Nelson*, 2 B. & C. 302, 3 D. & R. 556. That it is not alleged he had notice of logs being there, but was desired to make an opening in his dam, and the opening made by defendants might be through it—not being alleged to have been on the top of it or over it. That the logs are not alleged to have been of a floatable size, such as plaintiff was bound to provide a passage for, and might be sustained afloat merely by back water. *McKechnie et al. v. McKeyes*, 9 U. C. R. 563, 10 U. C. R. 53-4 S. C.

The occasion entitling defendants to use the stream and possession not sufficiently shewn.—*Dimes v. Petly*, 15 Q. B. 283.

The logs not alleged to be then and there, &c.—*Bateman v. Bluck*, 21 L. J. Q. B., 406.

(a) Ante page 531.

He did not press the additional ground to the fifth plea, but relied upon its being insufficient and uncertain—the terms “fall freshet” not being enough.

That if a sufficient opening existed, it was not required to be sufficient to pass logs; or if logs could pass without an opening, the defendants could not complain; and it is not alleged they were really obstructed for want of an opening, &c.

Not alleged to be a dam erected since the acts; if not, plaintiff was not bound to conform.—*Broom's Legal Maxims*, 164.

That the defendants have no remedy but such as the statute gives.—*Underhill et al. v. Ellicombe, McClel. & Young*, 450; *Boyfield v. Porter et al.*, 13 East 203; *Doe dem. Murray v. Bridges*, 1 B. & Adol. 847–859; *Fenton v. Trent & Mersey Navigation Co.*, 9 M. & W. 203; *Cousins v. Harris et al.*, 12 Jur. 407, 12 Q. B. 751; *Watkins v. Great Northern Railway Co.*, 6 Am. Eng. 179, 20 L. J. 391; *Marshall et al. vs. Nicholls*, 21 L. J. Q. B. 343, 16 Jur. 1156; *The Dundalk Western Railway Co. v. Taptser*, 1 Q. B. 667.

That the right and remedy are concurrent, and no other remedy results than is provided to protect the right.

He objected the want of allegation of time or duty: That the act did not justify the trespass, which is not laid to have been after the act came into force, which was a day subsequent to its passing; the trespass is alleged to have been between the passing of the act and October.—*Shepherd v. Shepherd*, 1 C. B. 849; *Ekins v. Evans*, 2 U. C. R. 144; *The Attorney General v. Shillibeer*, 3 Ex. R. 71.

That the acts do not include such a water course as this is described to be.—*Doe Hopkinson et al. v. Ferrand*, 20 L.J. C. P. 202; *Coe v. Platt*, 21 L. J. Ex. 107, 16 Jur. 174; *Rex v. Allan*, 2 O. S. 90; *The King v. Sanderson*, 3 O. S. 103; *Byrnes v. Bower*, 8 U.C. R. 181; Stat. 14 & 15 Vic. ch. 123; *Watkins v. London and Blackwall Railway Co.*, 3 Q. B. 755; *Perry v. Skinner*, 2 M. & W. 475; *Smith v. Bell*, 10 Ib. 378; *Doe dem. the Governors of Bristol Hospital v. Norton*, 11 Ib. 927; *Stracey v. Nelson*, 12 Ib. 535; *Moore v.*

Durden, 2 Ex. R. 24 ; Duke of Beaufort v. Smith, 4 Ib. 472 ; Dickinson v. Grand Junction Canal Co., 9 Am. Eng. 515 ; 16 Jur. 200.

Freeman, in reply, contended that the acts applied to *private* streams, such as the present ; and that, conferring the right to pass down logs, they gave the right to abate obstructions not authorized by the statutes to be interposed, or thereby required to be removed or obviated, and that a dam unless provided with an apron was such an obstruction.—Com. Dig., Pleader, title Trespass, 3 M. 38 ; 9 Went. 174 ; 3 Chit. Pleading, 549.

As to the demurrer to the replications, he relied on the causes assigned, and referred to Stephen's Pleading, 226.

Martin, in reply, said that however lawful to float logs down a stream running through private lands, it was equally lawful for the owner of the soil to erect a dam across, doing no damage to occupants above or below, and unless a strict legal right to float through plaintiff's close is shewn, the act done was a trespass.

As to the replications, he referred to the cases below as shewing that the defendants became trespassers *ab initio*.—Six Carpenters' Case ; Bayfield v. Porter, 13 East. 203 ; McCloughan vs. Clayton et al., 1 Holt 478, 482 ; Taylor v. Cole, 3 T. R. 292 ; 1 H. B. 555 ; Dye v. Leatherdale et al. 3 Wil. 20 ; Reed v. Harrison, 2 W. B. 1218 ; Lucas v. Nockells, 4 Bing. 729.

MACAULAY, C. J.—The first act on the subject of mill-dams was 9 Geo. IV. ch. 4, which enacted that every owner or occupier of any mill-dam which is, or may be legally erected, or where lumber is usually brought down the stream on which such mill-dam is erected, &c., who shall neglect to construct and erect a good and sufficient apron to his or their dam, as (thereinafter) set forth, shall for such offence yearly and every year forfeit and pay £25, one moiety to the King and the other moiety to whoever should sue for the same. Section 2 provided that the apron should be 18 feet wide by an inclined plane of 24 feet 8 inches to a perpendicular of 6 ft., &c., and where the stream or dam is less than 15 ft. wide, the whole dam to be aproned with the same inclined plane.

7 Vic. c. 36 *post.*

8 Vic. ch. 66, relates specially to the district of Huron.
10 & 11 Vic. ch. 20 *post.*

12 Vic. ch. 87, passed the 30th May 1849, to amend the statute 9 Geo. IV. ch. 4, recites that it was necessary to declare that aprons to mill-dams which are now required by law to be built and maintained by the owners and occupiers thereof should be so constructed as to allow a sufficient draught of water to pass over such aprons as shall be adequate in the ordinary flow of the streams to permit saw logs and other lumber to pass over the same without obstructions; and enacts that on, from, and after the first day of October next thereafter it shall be the duty of each and every owner or occupier of any mill-dam at which an apron or slide is by the said act (meaning 9 George IV., ch. 4) required to be constructed, so to have altered, and if not already built, to have constructed such apron or slide so as to afford depth of water sufficient to admit of the passage over such apron or slide of such saw logs, lumber, and timber as are usually floated down such streams or rivers, wherever such dams shall be erected. *Provided*, that every such owner or occupier of any such dam may construct a waste gate, or put up brackets and slash-boards in, upon and across any such apron, for the purpose of preventing any unnecessary waste of water therefrom, and to keep the same closed at all times, when no person or persons shall be ready and require to pass or float any craft, lumber, or saw logs over any such apron or slide, but not until such craft, raft, lumber, or saw logs shall have gained the main channel of the stream. *Provided also*, that no person shall be required to build such aprons or slides on *small streams, unless required* for the purpose of rafting or floating down lumber and saw logs as aforesaid. Section 2 makes special provision in relation to the river Otonabee. Section 3 enacts that every owner or occupier of any such dam, who shall neglect or refuse to make and construct, &c., and keep in repair an apron of such description as aforesaid, shall pay a penalty of ten shillings a-day for every day which such owner or

occupier shall have neglected to comply with the requirements of that act, &c., to be paid to the treasurer, &c., and for the general uses of the municipality. Section 4 allows a reasonable time for repairing or restoring aprons damaged or carried away. Section 5 enacts that *it shall be lawful for all persons to float saw logs* and other timber, rafts and craft down all streams in Upper Canada during the spring, summer and autumn freshets, and that no person shall by felling trees, or placing any other obstruction in or across such stream, prevent the passage thereof. *Provided always, that no person using such stream* in manner and for the purposes aforesaid *shall alter, injure, or destroy any dam or other useful erection in or upon the bed of, or across any such stream, or do any unnecessary damage thereto, or on the banks of such stream, provided there shall be a convenient apron, slides, gate, lock, or opening in any such dam or other structure made for the passage of all saw logs, and other timber, rafts and crafts authorized to be floated down such stream as aforesaid.*

7 Vic. ch. 36, to prevent obstructions in rivers and rivulets in Upper Canada, imposed a penalty not exceeding £5, nor less than one shilling daily, *over and above all damages which may arise therefrom*, upon any person who should throw into any river, rivulet, or water-course, or any owner or occupier of a mill who should suffer or permit to be thrown, any slabs, bark, waste stuff, or other refuse of any saw-mill (except sawdust), or any stumps, roots, or waste timber, or leached ashes, &c.; and that such penalty or damages should and might be respectively recovered, with costs, in a summary way before any one or more justices of the peace, &c., as therein provided. Section 2nd *limits the amount to be levied in any one case to £5 and costs.* Section 3,—penalties to be appropriated as therein mentioned—damages to be paid to the party aggrieved.

10 & 11 Vic. ch. 20, explained the last act, and specified *tan-bark* as a prohibited article, and prohibited felling trees across any such river, rivulet, or water-course, and declared the daily penalty not to exceed £5, nor less than one shil-

ling over and above all damages which shall arise therefrom, provided that nothing therein contained should extend to any dam, weir, or bridge erected in or over any such river, rivulet, or water-course, &c., or to any tree felled across to be used as a means of passage, &c. ; *provided*, &c., that such tree shall not be suffered to lie across such river, rivulet, or water-course in such a manner as to impede the flow of water or the passing of rafts in the same, &c.

14 & 15 Vic. ch. 123, enacted that the two previous acts, —7 Vic. ch. 36 and 10 & 11 Vic. ch. 20—should not, nor should either of them, nor any part thereof, extend to the River St. Lawrence, nor Ottawa, nor to any river or rivulet wherein salmon, or pickerel, or black-bass, or perch do not abound.

16 Vic. ch. 151, continues the three acts last above mentioned.

See also various acts authorizing the construction of mill dams in the River Thames and other streams in Upper Canada, under special regulations ; and the late act of 16 Vic. ch. 191, to authorize the formation of joint stock companies to construct works necessary to facilitate the transmission of timber down rivers and streams in Upper Canada.

1st. The first question presented by the demurrer to the 4th and 5th pleas is, whether they represent a water-course within the statutes, and it appears to me they do.

These pleas do not place the justification upon the stream being a public navigation or highway by water ; nor do they set up a private easement acquired by grant or long uninterrupted use and enjoyment, but rest it specially upon the privileges to which the defendants were entitled under the statutes and the omission of the plaintiff to comply with the provisions thereof in the construction of the dam, and it is not denied he might (subject to such provisions) lawfully obstruct the stream as against the defendants.

It might perhaps have been put upon the higher ground of a public or common right, owing to some expressions used in the pleas ; but it was not so treated in the argu-

ment, nor did the pleader so intend to treat it in framing the pleas. If it had been intended to rely upon a common law right of free passage, the pleas should have been framed accordingly, and offered to control the plaintiff's right to place any kind of dam in the stream; whereas all they do is (impliedly admitting such a right) to deny the existence of those accommodations for passing the saw-logs which the statutes require in streams otherwise strictly private.

2nd. The next questions are, whether the plaintiff's dam, constructed as it was, constituted a nuisance to the defendants; and if so, whether they were entitled to redress by any common law remedy, as by action, &c., for the consequential injury sustained by them, or whether they were restricted to, and the plaintiffs liable only to, such remedies or penalties as the statutes provide.

The question is not whether the common law remedies and the jurisdiction of the court in relation to such remedies have been taken away—touching which the following, among other cases, may be mentioned.—*Agard v. Candish* (Cro. Eliz. 326, Moor. 564, S. C.), *Cates q. t. v. Knight* (3 T. R. 442), *Shipman q. t. v. Henbest* (4 Ib. 109), 4 M. & G. 424-5, notes to *Albon v. Pyke*.

But (assuming that no common law right existed, and that whatever right the defendants had accrued under the statutes) the question is, whether for the infringement of such rights common law remedies can be applied.—*Castle's case* (Cro. Jac. 643), *Reg. v. Wigg* (2 Sal. 460, 2 Ld. Ray. 116, S. C.), 1 Sal. 45, note *a*.

It is to be observed that this is not a criminal proceeding by indictment or information at common law, against which it might be urged that the offence, not being one at common law, and the penalty or punishment being specially provided for in the statutes, the plaintiff could not be prosecuted as for a public nuisance by a criminal proceeding at common law.

In *Rex v. Wright*, clerk, (1 Burr. 543), Lord Mansfield drew the distinction between a new created offence, prohibited by a general prohibitory clause of an act of

parliament, where an indictment would lie, and a prohibitory particular clause, specifying only a particular remedy where such particular remedy must be pursued; and so the language of *Denison J.* to the same effect.—See also *Rex v. Robinson* (2 Burr. 800, 803), *Bulbrooke v. Goodere et al.* (3 Burr. 176-8, 1 W. B. 569, S. C.), the *King v. Harris* (4 T. R. 205), *Nicholson et al. v. Willan et al.* (5 East. 513), the *King v. Gregory* (5 B. & Ad. 555, 2 N. & M. 478 S. C.), *Crisp v. Bunbury* (8 Bing. 394), the *Queen v. Scott et al.* (3 Q. B. 543).

But the question is, whether any private or civil remedy by action or otherwise accrues at common law upon the infringement of the private right conferred by the statutes. *Underhill v. Ellicombe* (McClel. & Young 450), *Doe ex d. Bishop of Rochester v. Bridges* (1 B. & Adol. 847, 859), as to the general rule that where an act creates an obligation and enforces performance in a specific manner, that performance cannot be enforced in any other manner. See also the *Dandalk & Western Railway Company v. Tapster* (1 Q.B. 668), *Fenton v. Trent & Mersey Navigation Company* (9 M. & W. 204), *Albon v. Pyke* (4 M. & G. 421, *Ib.* 426, note *a*), *Skinner v. Lambert* (*Ib.* 478), *Kendall and John* (Fortes. 111—that a parliamentary right can be enforced only by the parliamentary remedy.

In the *Mayor &c. of Lichfield v. Simpson* (8 Q.B. 65)—a case in which the duty was created by statute, and being much in point, *Williams, J.*, says: “It may be true that the appointment of a particular proceeding by section 60 would exclude the remedy by indictment, but it cannot exclude an action on the case for damages.” Also *Stevens v. Jeacocke* (12 Ju. 477, 11 Q. B. 731), *Rann v. Green* (Cow. 474-6.)

In *Watkins v. The Great Northern Railway Company* (20 L. J., Q. B. 391), the common law remedy was held to be taken away by implication—the statute 8 & 9 Vic. ch. 20, authorising actions only in case of special damage by reason of defendants obstructing a highway, &c.

See *King v. The Rochdale Canal Company* (15 Ju. 896, 6 Am. Eng. R. 241. S. C. 14 Ju. 16), *Morrison v. Glover*

(3 Ex. R. 440), *Dickinson v. Grand Junction Canal Company* (16 Ju. 1200, 9, Am. Eng. R. 513), *Coe v. Platt* (20 L. J. Ex. 407; 21 L. J. Ex. 407, 5 Am. Eng. R. 491, S. C. 16 Jur. 174, 11 Am. Eng. 556), *Marshall v. Nichols* (21 L. J. Q. B. 343, 16 Ju. 1156, 12 Am. Eng. R. 466)—*Erle, J.* says, in reference to 8 Q. B. 65, (*supra*), that the summary remedy was not co-extensive with the injury, and therefore the common law right of action was not taken away.—*Broom's Legal Maxims*, 91; *Com. Dig.* "Action," and "Action upon statute," &c.; *Ib.* "Action on the Case 'Nuisance;'" *Embrey v. Owen* (15 Ju. 633, 20 L. J. Ex. 212, 4 Am. Eng. R. 466.)

The inference I draw from the cases is, that although the right to pass saw logs over the plaintiff's dam was derived exclusively from the statute, and not at common law, as a public or common easement in the "Boston Creek;" and although the act subjects mill-owners to a daily penalty for neglecting to make an apron, &c. in their mill-dams, still, that for non-performance on this head, or for erecting dams without such aprons or slides, &c., so as to impede and obstruct the descent of saw logs, to the special damage of a particular individual, a common law remedy is open to him by action on the case. The remedy provided by the statute 12 Vic. ch. 87 sec. 3, is a mere penal one for the protection of the public, and does not afford a remedy co-extensive with the injury to which private individuals may be subjected; but the 5th sec. does, in express terms, confer the private right of passage; and for an obstruction in the exercise thereof prejudicial to the party, I think an action in the case—in other words, a common law remedy—is open to him.

I have not overlooked the peculiar terms of the 7th Vic. ch. 36, and other acts above mentioned, but do not consider them materially to affect the question.

3rd. The next general question is, whether an obstruction, such as these pleas describe, by a mill-dam otherwise lawfully erected, but without any apron or slide &c. made therein, is a private nuisance to the owners of saw logs ready to pass but prevented passing thereby, of that nature

and description that the owners can adopt the summary remedy of abating it.

That a party injured thereby may abate a private nuisance as well as a public one, though in the soil of another, seems a well settled rule.—Penruddock's case (5 Co. 101), Vin. Ab. "Nuisance" S. W.; Lodie v. Arnold (2 Sal. 458), Rex v. Rosewell (Ib. 459), Baten's case (9 Co. 55, Godb. 221. S. C.) 2 Roll. Ab. 144-5, & 565 l. 50; 3 Bl. Com. 5; F. N. B. 184-5 G. 2 Inst. 385; Com. Dig., "Action on the case—"Nuisance," D. 4, James v. Hayward (Cro. Car. 184), James v. Hayward (W. Jones 222), Mason v. Cæsar (2 Mod. 65-6), Williamson v. Coleman (Styles 470), Hughes v. Keymish, (2 Bul. 115), 1 Haw P. C. 695, C. 32, S. 12, Wigford v. (Cro. Eliz. 269), Bac. Ab. "Nuisance" A. mentions three kinds of nuisance—public—common—private; Dewey v. White et al. (1 M. & M. 56), Cooper v. Marshall (1 Burr. 259, 267-2 Wil. 51, S. C.), Kirby v. Sadgrove (1 B. & P. 15-16).

In 1 Burr. 245, Lord Mansfield distinguishes between the abatement of hedges by individuals (as in 2 Mod. 66, supra), where they did not meddle with the soil but only pulled down the erection; and the disruption of the soil itself—See Arlett v. Ellis (7 B. & C. 346), Raikes v. Townsend (2 Smith 9), Pickering v. Rudd (1 Star. N. P. C. 56), Lord Lonsdale v. Nelson (2 B. & C. 302 3 D. & R. 556)—in which the subject is much discussed: Perry v. Fitzhowe (8 Q. B. 757, 10 Ju. 793, S. C.), Barling v. Read et al. (14 Ju. 395-6), Com. Dig. "Pleader" 3 M. 38; Davis v. Williams (15 Ju. 752, 5, Am. Eng. R. 259).

That a private individual cannot abate a public nuisance, unless by reason of some special inconvenience or prejudice to himself or an occasion to require and justify it.—Dimes v. Petley (15 Q. B. 276, 14 Ju. 113-2, S. C.), Bateman v. Black (21 L. J. Q. B. 406, 14, Am. Eng. R. 69.)

If it be correct to hold that under the facts set forth in the pleas, the plaintiff might have maintained an action on the case as for a nuisance or tortious obstruction of the exercise of his right; it seems to me if not to follow, to be equally clear, that he may, in lieu thereof, summarily remove the

obstruction, so far as necessary to enable him to enjoy his right.

Without discussing the origin or nature of rights, public or private, in water-courses or in flowing or running water, regarded as a transient element, which will be found fully treated of in the case of *Embrey v. Owen* (15 Ju. 633), *The Queen v. Myers* (3 U. C. C. P. 205), and see *Dickinson v. Grand Junction Canal Company* (7 Ex. R. 299, 300), and without attributing to the defendants a right at common law, either original or acquired, to the free use of the stream mentioned in the pleas, for the purpose therein also mentioned, it is evident that the statute (12 Vic. chap. 87, sec. 5) conferred the right in terms so distinct, that I think it must be looked upon as equivalent to a declaration of such right, upon the principles of the common law. And since it is obvious that the obstruction stated in the pleas was calculated to inflict an immediate injury upon the owners of the saw-logs, and which the slow remedy by action (at the instance of perhaps numerous separate proprietors), might prove a very inadequate remedy, the urgency of the case would justify summary redress, as much as in the cases of positive nuisances infringing similar rights strictly derived at common law.

I am not able to point out any satisfactory distinction.

The act justified is not any direct injury to the plaintiff's soil, but to the erection placed in that part of his close which is covered by the waters of "Boston Creek," and unlawfully so placed—so far as from want of the necessary apron or slide &c. it obstructed and prevented the passage of the defendants' saw-logs.

The pleas show the right—the plaintiff's obstruction of that right—and an exigency such as would justify the abatement pleaded, if it was a public or common nuisance, or a private nuisance, at common law; and I perceive no sufficient reason why the same privilege did not exist, conferred as the right was, and obstructed and hindered as the defendants were.

4th. As to the minor points of exception to the 4th and 5th pleas :—

1st. The 4th plea in the introductory part only professes to answer the taking up and removing a small portion of the structure in the 1st count mentioned, and thereby a little pulling up, breaking, demolishing, destroying, damaging and spoiling the same, and the causes of action and damage in respect thereof.

The 5th plea is even still more restricted—namely, as to the taking up and removing a small portion of the structure and thereby a little damaging and spoiling the same, and all damages and causes of action in respect thereof.

They do not profess, otherwise than as above, to answer the whole count; and, whether what they do profess to answer be *prima facie* to the whole or only to a part of the first count, I think they do answer all they do so profess to answer; and if a plea in the matter of it meets and answers all that in the introductory part of it it professes to answer, it is sufficient.

If what it recites be immaterial, and does not include the gist of the action, or some material allegation which, being displaced, would destroy the right of action; that is not the objection taken, nor do I suppose any such objection could have been maintained.

2nd. As to the 2nd ground of special demurrer—the 4th plea says it was a stream called “Boston Creek,” and that saw-logs were floated down such stream: that the plaintiff’s structure was a dam crossing such stream, which dam had no apron, slide or opening, &c., as required by the statute.

The 5th plea refers to the 4th with respect to such description, and when the residue of each is followed out, I think they do, with sufficient certainty, indicate that it was a private stream, and that the defendants rely upon the authority of the statute for the right, on their part, to render the dam practicable for the passage of the saw-logs, as the plaintiff should have done, was requested to do, but refused to do.

An apron or slide should have lowered the dam to a

sufficient extent in depression and width to have admitted the passage of logs; and so far as materials were placed that blocked up the apertures or space that ought to have been left, so far the defendants were justified in removing or displacing it.

3rd. I think the word "*stream*" and "stream called Boston Creek" import a stream of water, and the pleas in other portions thereof show this, if doubtful in themselves; and that the pleas do show with sufficient certainty the obligation upon the plaintiff to have had an apron; and

4th. That the defendants were authorised to float logs down such stream, at the place where, &c.

5th. That there is in the 4th plea a sufficient request to remove the obstruction, or to make a passage or slide, &c., averred.

The 5th plea does not aver any request, nor excuse the omission, nor do I see that it was necessary. It alleges that there was no apron, slide or opening, &c. to the dam, and that it obstructed the logs. If under these circumstances they were justified in breaking the dam, after request, I do not think a previous request would be necessary. If there was an apron or slide, &c., with brackets or slash-boards, &c., then, according to the first proviso in the statute (12 Vic. ch. 87, sec. 1), a request to remove the same would be necessary; but I do not consider that the word "*required*" in the second proviso is equivalent to *request*, but means to dispense with such aprons, slides, &c. in small streams in which such conveniences were not requisite, by reason of no saw-logs requiring to be passed.

The plaintiff having refused to make an opening according to the 4th plea, there could be no duty or obligation upon the defendants to wait a reasonable time, in case he might change his mind.

It was not necessary to allege danger to life or health if the necessity for an opening to pass down the saw-logs justifies the act. Nor do I perceive that the right to abate, if it existed, was exercised at midnight or other untimely hour or season, if material. It is alleged there was an autumnal freshet and sufficient water in the said stream to

float the logs, &c., and that the plaintiff, though requested, refused to make the opening, &c. The refusal is not stated, nor does it appear to have proceeded from want of time or from the request being untimely, but from want of inclination.

It is alleged there was water sufficient in the stream, and we cannot intend it was not so naturally, contrary to the import of the allegation.

6th. I think it is distinctly shewn that the dam did obstruct the natural flow of the water, and that the logs, being described as "*saw-logs*," (a term used in the statute), must be taken to have been such as were entitled to be passed at the place in which, &c.

7th & 8th. The pleas appear to me correctly to justify the trespasses for the purpose of allowing the saw-logs to float past and over the plaintiff's dam, and do sufficiently show that the defendants had occasion to use that part of the stream at the time, when, &c. Also, that the logs were then and there present and ready, and that defendants wished or desired to pass on with them past the plaintiff's dam, and down the stream.

Upon the whole therefore, I think the 4th and 5th pleas good, and that the demurrer as to them must be overruled.

5th. The general questions raised upon the demurrer to the replications are, whether the *conversions* to the defendants' use therein alleged shew them to have been trespassers *ab initio*, or can be replied or new assigned as being substantive acts of trespass, and not covered by the pleas to which the replications relate.

The question does not depend upon the learning as to new assignments, properly so called; but upon the cases of replications, which are said rather to partake of the nature of new assignments than to be properly and strictly so: as, when a person abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, where if the defendant pleads such license or authority, the plaintiff must reply the abuse.—The Six Carpenters' case (8 Co. 146, 1 Smith Ldg. Cas. 62, and see *ib.* 59, notes), *Dye v. Leatherdale* (3 Wil. 20), *Taylor v. Cole*

(3 T. R. 292, 1 H. B. 555), *Gundry v. Feltham* (1 T. R. 333), *Oxley v. Watts* (Ib. 12), 1 Saund. 300, *e. f. g.* ib. 28 (a), (b), (3), Com. Dig. "Trespass" C. (2), Bac. Ab. "Trespass" B.

But if the circumstances are such that the excess does not make the defendants trespassers *ab initio*, the plaintiff, instead of replying, must new assign.—*Bone v. Daw* (3 A. & E. 718-9, per Patterson, J.), *Shorlane v. Lovett* (5 B. & C. 485-8, D. & R. 257), *Smith v. Eggington* (7 A. & E. 167), *Gargran v. Smith* (1 Sal. 221), Bull. N. P. 81, *Gates v. Bailey* (2 Wil. 313), *Bagshaw v. Gaward* (Cro. Car. 147), Perkins S. 190, 191, *Lowe* 90, *Aitkinhead v. Blades* (5 Taunt. 198, 1 Mar. 17, S. C.), *Spalding v. Rogers et al.* (1 U. C. Rep. 136) *Price v. Peek* (1 Bing. N. S. 380), *Bush v. Parker* (Ib. 72), *Kerby v. Denby et al.* (1 M. & W. 336), *Manprivatt v. Smith* (2 Cowp. 175), *Oakes v. Wood* (3 M. & W. 150), *Atkinson v. Warne* (5 Tyr. 480), *Penn v. Ward* (Ib. 980), *Griffin v. Scott* (Stra. 716, Ld. Ray. 1424, S. C.), *Read v. Harrison* (2 W. B. 1218), *Sparkes v. Keeble* (8 Mod. 330), *Woods v. Durrant* (16 M. & W. 149, 155), *Haughton v. Bath* (4 T. R. 364).

The first proposition in the Six Carpenters' case has been frequently recognized and enforced as in *Smith v. Egginton* (7 A. & E.).—*Littledale, J.* said, the general rule was, in that case, that where there is an authority given by law for doing an act, then an abuse may turn the act into a trespass *ab initio*—see also *Smith v. Mills* (1 T. R. 477), *Curleais v. Laurie et al.* (12 Q. B. 640), *Page v. Hatchell* (8 Q. B. 187, 197) *Harvey v. Pocock* (11 M. & W. 740), *Dod v. Manger* (6 Mod. 215-6). The two last cases present the question, whether a partial excess renders the defendant a trespasser *ab initio* in toto or only *pro tanto*—see also *West v. Nibbs and Anr.* (4 C. B. 192), *Price v. Woodhouse and Anr.* (1 Ex. R. 559), *Pratt v. Pratt* (17 L. J. Ex. 299, 6 D. & L. 20 S. C., 2 Ex. R. 413, S. C.); that a *conversion* is mere aggravation—*Woods v. Durrant* (16 M. & W. 149, S. P.)

The cases shew, I think, that by the abuse of an authority in law, a party may become a trespasser *ab initio*.

To apply the rule to the present case :

1st. The 2nd count complains of the defendants having broke, tore to pieces, cut in pieces, damaged and spoiled a dam of his, appurtenant to his saw-mill called, "Owen's Mill;" and *also that they, on the said several times when, &c., seized and took the materials of the said dam—to wit, 50 pieces of wood, &c., cast about, damaged and injured the same, and carried away and converted and disposed thereof to their own use, &c.*

The 6th and 7th pleas to that count, as to taking up and removing a small portion of the said dam, &c., justify under the statute taking up and removing a small portion thereof—to wit, one log in the 6th plea, and one log and a small portion of the earth thereof in the 7th plea, which the pleas say were taken up and removed to admit of the passage of the saw-logs, &c.

To these pleas the plaintiff replies, that *after* taking and removing the said small portion of the said dam—to wit, on the 1st November 1852—defendants *converted* and disposed of the materials of the said dam to their own use, *in manner and form as the plaintiff has above alleged.*

To this replication defendants demur, because they do not confess and avoid, nor deny the pleas; and it is uncertain whether they are intended to be pleaded by way of new assignment or traverse.

It appears to me they neither traverse nor are they pleaded by way of new assignment; but in reference to that which as it stands in the 2nd count was only aggravation, and not material to be answered by the pleas, they specially reiterate the allegations, thereby rendering them material, as shewing an abuse of the authority in law, on which defendants rely in justification of their acts, and rendering them trespassers *ab initio*.

Neither of the pleas state that the materials removed were deposited in a convenient place for the plaintiffs, as is usual, but merely say they did no unnecessary damage. On the other hand, the replications are not expressly limited to the materials so disrupted and removed; but express in general terms the materials of the dam.

However, it appears to me the result of the authorities, that a wrongful conversion of the materials taken up and removed is such an abuse of the authority in law under which the defendants acted, as to render them trespassers *ab initio*; and this, although it was not the whole dam, or all that was lawfully displaced originally as loose earth, &c., that was so converted; as portions of the dam may have floated down the stream or sunk to the bottom, &c. The replication charges the conversion of the whole, and if restricted to a part only, I am not satisfied it would make any difference.

Then it may be said the *conversion* is alleged to have been *after* the abatement of the nuisance, and therefore is to be looked upon as a separate transaction, and not part of a continuous act (12 Q.B. 680). The declaration, however, charges the *conversion* at the several times when, &c., and the replications re-assert the conversion in manner and form alleged. I apprehend therefore, we must, on these pleadings, look upon them as sufficiently connected and forming successive parts of one transaction, and that consequently the demurrers should be overruled, and judgment be against them.

This renders it unnecessary to consider the grounds of general demurrer objected to the pleas.

Were it material to do so, a reference to the opinions expressed upon the demurrers to the 4th and 5th pleas shew that I deem the pleas good in substance, and that in my opinion they do confess what they profess to avoid, and do sufficiently answer what they so confess.

2nd. As to the 4th count and the pleadings thereto:—

The 8th plea to the 4th count is clearly bad in law, for professing to answer more than it does answer.

The 4th count charges a demolition and destruction of the plaintiff's dam, and the seizing, taking, and carrying away, &c. of his said logs—neither of which are at all included in or justified by the matter contained in this plea. The plea is not limited merely to the easement in the first part of the count mentioned. But if good, *prima facie* the replication (assuming that it may be only matter of aggrava-

tion) alleges that after what the defendants allege in justification or excuse, they broke, demolished, injured and destroyed the said several easement *modo et forma*, &c., of which the plea says nothing; but which, if true, and on this demurrer, it is—if well pleaded—to be taken as true, renders the defendants trespassers *ab initio*.

The 9th plea is limited to the breaking, demolishing, injuring and destroying the said dam in the 4th count mentioned, and the seizing and taking, &c. the plaintiff's logs—omitting the alleged conversion thereof; and then proceeds to justify in substance, as in the 4th plea to the 1st count.

The plaintiff replies, that *after* committing the trespasses in that plea recited, the defendants broke, demolished, injured and destroyed the *said several easement* of plaintiff in the 4th count mentioned, *modo et forma* alleged.

It is not clear to me that this plea is not bad for not fully answering all it professes to justify, but perhaps the gist of the declaration in the portions recited are substantially met, as the plaintiff has pleaded over to it, thereby treating it as good in law *prima facie*.

The 10th plea is to the same trespasses recited in the 9th, and in the matter is more specific than the last.

The replication to that is similar to the replication to the 9th plea.

To all these three replications defendants demur, on the same grounds as to the replications to the 6th & 7th pleas; and the plaintiffs object, on general demurer to the pleas themselves, on the same grounds as to the 6th & 7th pleas, namely:—

1st. That they do not confess and avoid.

2ndly. Are not sufficient in law in the matter of them, which is so general a ground as to want explanation.

3rdly. And on the grounds objected to the 4th plea.

I think the 8th plea bad for the reasons already mentioned. It becomes therefore unnecessary to consider the replication to that plea. But as the three replications are similar in terms, it is necessary to consider them in reference to the 9th and 10th pleas—the last especially. The main objection

to them is, that they re-assert a trespass, *vi et armis*, to a *several easement* of the plaintiff, which is said to be a ground for case, not trespass, and to be invalid as vague and uncertain, &c.—*Ld. Dacre v. Tibb* (2 W. B. 1151), *Holford v. Bailey* (10 Jur. 822, 8 Q. B. 1000 S. C.), *Curlewis v. Laurie et al.* (12 Q. B. 640), *Young v. Hichens* (6 Q. B. 606), *Co. Lit.* 122, *Sprigg v. Rawlinson* (Cro. Car. 554), *Smith v. Kemp* (2 Sal. 637), *The Duke of Somerset v. Fogwell* (5 B & C 875), *Arlett v. Ellis* (7 B. & C. 346, 9 D. & R. 897).

The point was very fully discussed in *Holford v. Bailey* (*supra*), and seems to reduce it to the question of certainty in describing the easement, to shew that it is an easement for a direct injury to which trespass may be maintained—as some rights of fishery, &c.—1 Saund. 353, a. b. & notes.

Here the 4th count describes the *locus in quo* as the *several easement of the plaintiff in the water* of a rivulet called “Boston Creek,” then flowing and being between certain lands occupied by Fogin, *to wit*, the right of the plaintiff, by means of *a dam*, there to have and continue the water raised above the natural height, and to have and continue the water spread over the land on the margin thereof, beyond the natural spread, and within such water to keep saw-logs, &c. Now what the plaintiff claims to have been possessed of was a several or separate easement in the waters of Boston Creek—such easement being the right by means of a dam, to raise the waters above their natural level, and seems, though in a round-about way, to describe his easement as being a pond of water, caused and sustained by a dam; and then complains of the defendants’ having broken and entered such pond of water, and then breaking and destroying the said dam, and dispersing all the water raised thereby. The easement, taking the whole count together, consisted of the right to the dam and the body of water raised thereby.

Then the replications allege that the defendants, *after* the trespasses, justified, broke, demolished, injured and destroyed the said easement, in manner and form alleged.

They are in effect new assignments, though in the form

of replications of excess, and aver subsequent additional acts of trespass, *after* those justified. The opinion expressed upon the replications to the 6th & 7th pleas apply to these. (a)

As informal new assignments, the question raised at the argument was one of general demurrer, not stated in the causes assigned—namely, that trespass does not lie to an easement, such as the plaintiff has described.

Confining attention to the causes of demurrer *stated*, and properly before us—the first objection is, that the replications do not confess and avoid, nor deny nor take issue upon the pleas, and are uncertain, whether pleaded by way of traverse or new assignment.

The answer seems to be, that they give the go-by to the pleas, and re-assert and rely upon other independent acts as being in themselves substantive trespasses, if they do not also show the defendants to be trespassers *ab initio*; and that they are not traverses, but in effect new assignments of other trespasses than those covered by the pleas.

As to what was said in argument of the insufficiency of the occasion, as stated in all the pleas involved in this demurrer, I refer to *Ward v. Robins* (15 M. & W. 237).

I do not see that the replications are open to the objection of duplicity; no such cause of demurrer is assigned, and the case cited bears materially upon the point—*Talson v. The Bishop of Carlisle* (12 Jur. 438).

Then, as to the want of certainty in point of time in these pleas justifying under the statute, I think they show that the time when, &c., was after the act came into operation—the 4th plea states the floating of saw-logs, &c., from before the passing of the act until the 1st November, 1852.

The declaration mentions a time since the act came into operation, and the 5th plea follows the time therein alleged. So does the 8th plea to the 4th count; and the 9th and 10th pleas to that count, in this respect, are like the 4th plea.—*Lawe v. King* (1 Saund. 78), *Ekins v. Evans* (2 U. C. R. 144), *Worthington et al. v. The Municipal Council of Haldimand*

(a) Ante page 551.

(10 U. C. R. 220), *The Attorney General v. Shillibier* (3 Ex. R. 71), *Stead v. Poyer et al.* (1 C. B. 782), *Shepherd v. Shepherd* (Ib. 849).

The result is, that in my opinion judgment should be :

1st. For defendants—*i. e.* against the demurrer, to the 4th and 5th pleas to 1st count, and to 8th and 9th pleas to 3rd count.

2ndly. For plaintiff—*i. e.* against the demurrer to the replications to the 6th and 7th pleas to 2nd count.

3rdly. For defendants—*i. e.* against demurrer to 8th and 9th pleas to 3rd count.

4thly. For plaintiff as to the 8th plea to 4th count

5thly. For plaintiff—*i. e.* against the demurrer to the replications to the 8th, 9th and 10th pleas to 4th count.

Wherefore defendants are entitled to judgment as to the 1st and 3rd counts ; and the plaintiff to judgment against defendants as to the 2nd and 4th counts.

McLEAN, J., concurred.

Per Cur.—Judgment for defendants as to 1st and 3rd counts—for plaintiff as to 2nd and 4th counts.

A DIGEST

OF

ALL REPORTED CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

FROM MICHAELMAS TERM, 16 VICTORIA, TO
TRINITY TERM, 17 VICTORIA.

ABATEMENT (PLEA.)

Autre action in County Court—Certainty.—The pendency of a suit for the same cause, &c., in a county court, may be pleaded in abatement to an action brought in this court. Such a plea, setting forth that defendant was served with and appeared to a writ issued from the county court, at the plaintiff's suit, in trespass (the action pleaded to being trespass), as appears by the record, and then alleging as a matter of fact to be tried *aliunde* that the causes of action are identical, is bad. It should aver that the identity of the two causes of action *appears by the record*. The plea in this cause, as given in the report, was also held bad for uncertainty. *Grant v. Hamilton*, 422.

ACCIDENT.

See CARRIERS—HIGHWAYS—LANDLORD AND TENANT, 1.

ACCORD AND SATISFACTION.

See DEBTOR AND CREDITOR.

ACTION.

See HIGHWAYS—MUNICIPAL COUNCIL ACTS, 7, 8.

ADMINISTRATOR.

See SET OFF, 1.

AGREEMENT.

See DEBTOR AND CREDITOR—LANDLORD AND TENANT, 1.—PARTNERS ETC., 1.

ALLOWANCES FOR ROADS.

See MUNICIPAL COUNCIL ACTS, 6.

APPEARANCE.

See EJECTMENT, 2.

APPRENTICE.

See COVENANT, 1.

ARBITRATION AND AWARD.

Construction of award—Finality, Certainty.—Two partners (plaintiff and defendant) having dissolved partnership, refer all disputes to the arbitration of three persons named.—Bonds are executed, to abide their final decision. The award directed a certain sum to be paid by defendant to plaintiff, and then added that the same was "to be secured by such good security as may be requisite to save the said plaintiff harmless." *Held*, award sufficiently final. *Held*

also, that the award directing that defendant should pay *all* debts due by the partnership was sufficiently certain, without determining the *amount* for which defendant was to be responsible. *McLean v. Kezar*, 444.

ARREST.

See MALICIOUS ARREST.

ARREST OF JUDGMENT.

See MALICIOUS ARREST.

ASSIGNMENT.

See DEBTOR AND CREDITOR—PARTNERS, ETC.

ASSUMPSIT.

See BILLS OF EXCHANGE, ETC.,—CARRIERS—CONTRIBUTION—EVIDENCE, 1—HUSBAND AND WIFE,—LANDLORD AND TENANT, 1—PARTNERS, ETC., 1—VENDOR AND PURCHASER, 1.

Materiality of issues.—Assumpsit: Declaration—that the plaintiff having an agreement for a lease of a certain mill-privilege from A. B., the defendant offered for the plaintiff's right to such privilege certain specified lands and promissory notes, or the assignment of a mortgage for £500; and "that the plaintiff agreed to accept one of the said offers on or before the 18th of March 1851, and to pay the water rent of the said privilege up to the 1st of January 1851;" and that it was further agreed that the lease should be made to the defendant from the said A. B., and that the plaintiff did "afterwards, on the 18th of March 1851, accept an assignment of the said mortgage," (one of the offers). *Held*, that as the *onus* of procuring a lease was assumed by the plaintiff, the payment of rent up to the 1st of January 1851 was of no consequence to the defendant, and not material, if the plaintiff obtained the

lease; and that therefore a traverse of such payment was an immaterial issue. *Quere*, the materiality of the plea traversing the allegation of the acceptance of the assignment of mortgage, and the effect of that plea. *Benns v. Raymond*, 126.

ASSURANCE.

See INSURANCE.

AUCTION.

Sufficiency of contract—Trove for thing sold.—In an action of trover by the plaintiff for a buggy bought by him at auction, he took a nonsuit, the judge being of opinion that his case failed on objections taken at the trial. His application in *banc.* to set aside the nonsuit was refused on the grounds that the note or memorandum taken at the time of the sale having been lost, and there being no proof of what it contained, there was not a sufficient note or memorandum within the Statute of Frauds; and that the proof of tender of the price was not sufficient, from the fact that the person to whom it was offered did not appear to be authorized to receive the same. *Ryan v. Salt*, 83.

AUTRE ACTION (PLEA.)

See ABATEMENT.

AWARD.

See ARBITRATION AND AWARD.

BASTARD.

Bastardy—Admissibility of Evidence to prove the same.—Whenever it is sought to bastardise a child, if it only appear that the child may be the offspring of her mother's husband, or of another man, not the husband, but it is doubtful of which, the law presumes in favor of legitimacy, and does not sanction a discriminating inquiry upon the subject. The fact to be

established in this case was the negative of the presumed legitimate paternity by proof of non-access. The facts adduced in evidence are fully given in the report; and *held*, that as to the evidence offered, that of general reputation of intercourse by the mother with some person other than her husband three months before marriage, was properly rejected. The husband committed suicide five months after the marriage; and *held*, that proof of the report in the neighbourhood as to its cause was also properly rejected; and further *held*, that it was in the discretion of the learned judge at Nisi Prius to refrain from committing the alleged father, who was examined as a witness, for contempt in not answering, because it was sought by questions put to him to elicit an admission of facts importing a scandal upon himself. Besides, the learned judge thought the witness intoxicated and by no means able to give evidence at all. Evidence of the resemblance of the child to the alleged father, if relevant to the issue, is admissible. It can only become relevant after a sufficient foundation has been laid to raise suspicion. *Held*, that in this case such foundation appeared to have been laid, and the evidence was therefore admissible. But the plaintiff having voluntarily elected a nonsuit (not by the suggestion or direction of the court), without any reference to the rejection of evidence, he cannot be relieved against it. *Doe Marr v. Marr*, 36.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See DEBTOR AND CREDITOR — DE INJURIA, 1, 2, 3.

Action against maker and indorsers — Defence inapplicable to all defendants.]—1. Where in an action by an indorsee, the holder of a promissory note, against the maker and the in-

dorsers, under the provincial statutes, the defences clash, or the facts set up as a defence are not equally adapted as a defence to all the parties, they should plead separately. Therefore, a plea by all the defendants that there was no consideration for the making of the note, nor for the respective indorsements, nor either of them, and that plaintiff holds the note without any consideration or value, is bad. *Hawke v. Salt et al.*, 97.

Plea to action on note — Duplicity.]—2. Action by an administratrix: Declaration—Third count, on a note made by defendant, and payable to C. D. or bearer, who transferred to the intestate. Plea, that C. D. delivered said note to the intestate as his attorney to collect the same, and that the defendant paid the intestate as such attorney, in full satisfaction. *Held*, plea bad. *Blackstone v. Chapman*, 221.

Action on note — Traverse of plaintiff being the holder.]—3. Assumpsit on a promissory note, payee v. maker. Plea—that after the making of the note and before it became due, the plaintiff indorsed said note to a certain person whose name to the defendant is unknown, who is the holder thereof, &c. Replication—"that the plaintiff was at the time of the commencement of the suit and still is the holder of the said note"—without this, &c. *Held*, replication bad, because it did not traverse that any other person than the plaintiff was the holder of the note at the time the action was brought. *Brunskill v. McGuire*, 408.

Action on promissory note — Indorsees v. Joint and several Makers and the Indorsers — Declaration.]—4. Assumpsit on a promissory note. Declaration—"for that whereas the said defendants, R. D. and J. D., on, &c., made their promissory note, &c., and thereby jointly and severally promised to pay the defendant, E. S.,

or order the sum of, &c., and the said defendant E. S. then indorsed the same to the said defendant D. M., and the said defendant D. M. then indorsed said note to the plaintiffs;" then followed averments of presentment, non-payment, due notice and joint and several liability of *all* the defendants (R. D. and J. D., E. S. and D. M.); then it proceeded, "and being no liable, they *jointly and severally* promised to pay," &c. And there was no allegation of *time* to the averment of notice. *Held*, declaration good—there being no real inconsistency between the recital and promise, and the want of allegation of time being no ground of demurrer. *Gibb et al. v. Dempsey et al.*, 437.

BOARD OF SCHOOL TRUSTEES.

See COMMON SCHOOL ACTS.

BOND.

See COVENANT—PORK-INSPECTOR.

BOUNDARIES.

See DEED, 1—SURVEY.

BY-LAWS.

See COMMON SCHOOL ACTS, 1. MUNICIPAL COUNCIL ACTS, 1, 3, 4.

CARRIERS.

See CUSTOM.

Carriers by water—Liability for accidents by fire—Pleading.]—Assumpsit: Declaration—that the defendant owned the schooner "Elizabeth," and plaintiff at his request loaded her with 1634 barrels of flour, to be shipped from C. (in Canada) to O. (in the United States), to be safely and securely delivered—the dangers of navigation excepted. Breach, that the flour was wholly lost through negligence of defendant. 1st plea, as to

400 barrels—that a fire happened on board of the schooner without any wilful negligence of defendant, by which the schooner and flour were destroyed. 2nd plea, as to the residue—related the accident as in 1st plea, and then averred that the said residue was rescued in a damaged state and delivered to plaintiff, who accepted it. 3rd plea, to the whole declaration—like the first in substance. *Held*, that the Imperial statute 26 Geo. III. ch. 86, sec. 2, is in force in Upper Canada and exonerated defendant from his promise to deliver the flour, by reason of the accidental fire: *Held*, also, on demurrer to the second plea, that it was not bad for duplicity. *Torrance v. Smith*, 411.

CASE.

See HIGHWAYS—MALICIOUS ARREST—MUNICIPAL COUNCIL ACTS, 8.

CAVEAT EMPTOR.

See VENDOR AND PURCHASER, 1.

CERTAINTY.

In awards—See ARBITRATION.
In pleading—See CUSTOMS ACTS.

CHATTEL MORTGAGE.

Insurable interest of mortgage.]—*See* INSURANCE.

COMMITMENT.

See WITNESS.

COMMON COUNTS.

See PARTNERS, ETC., 1.

COMMON SCHOOL ACTS.

Levying school-rates—Legality of By-law authorizing the same.]—1. A by-law, passed by a township municipality, authorizing the levy of a certain rate to realize the sum of

£100 for school purposes, having been quashed, the municipality then, without a second meeting having been called, passed another by-law (set out in the report) for the same purpose, which was also moved against on several grounds: *Held*, on the several objections taken—1st. That the discretion to apportion the sum required rested as much with the council as with the school meeting or trustees. 2ndly. That the rate was not declared on the property assessed in 1852 (the preceding financial year), but only determined by reference to the assessed value of taxable property in that year. 3rdly. That the rate not being complained of as excessive, its being calculated to realize more than the precise sum of £100 did not render the by-law void. 4thly. That the meeting was not indispensable. 5thly. That the duty imposed upon the clerk of the municipality was not unreasonable, or inconsistent with the statutes. 6thly. That the rate was properly assessed upon the whole ratable property of the school section. 7thly. That the proviso of the by-law sanctioning the receipts *pro tanto* from those who had paid under the invalid by-law did not render the by-law void. *In re De la Haye and the Municipality of the Gore of Toronto*, 23.

Application for separate schools.—2. Application for a mandamus to the Board of School Trustees of the City of Toronto, commanding them to authorize the establishment of a separate Roman Catholic school in *school section No. 9*, in St. James's Ward, in the said city: *Held*, that the Board, and not the applicants, is to prescribe the limits of separate schools, and that the application should therefore be for *one or more such schools* in general terms, leaving it to the Board of Trustees to define the same. *In re Hayes and the Board of School Trustees of the City of Toronto*, 478.

COMPANIES.

See HIGHWAYS.

COMPOSITIONS.

See DEBTOR AND CREDITOR.

CONSIDERATION.

See BILLS OF EXCHANGE, ETC., 1—
CONTRIBUTION—DE INJURIA, 3.

CONTEMPT.

See WITNESS.

CONTESTED ELECTIONS.

See MUNICIPAL COUNCIL ACTS, 5.

CONTRACT.

See AUCTION—CONTRIBUTION—INSURANCE—LANDLORD & TENANT, 1—PARTNERS, ETC., 1—VENDOR AND PURCHASER, 1.

CONTRIBUTION.

Special assumpsit — Indorser v. Co-Indorser of a note unpaid, for contribution by express contract.—Special assumpsit by one of several indorsers against defendant, a co-indorser of a promissory note made by one A. B., and indorsed by all the parties, to enable A. B. to discount it at a bank. The declaration set forth that A. B. made his note payable to G. L. A. at the Bank U. C.; and that it was thereupon agreed by and between said defendant and said plaintiff and the said G. L. A. and the other indorsers (naming them), that if plaintiff and the other parties would indorse said note, and the indorsers should become liable to pay the same, then that defendant would pay to the holder thereof such sum of money as upon an equal division of the whole amount would be his share. Then it averred indorsement by plaintiff—non-payment of the note—non-

performance by defendant of his promise, and that plaintiff was thereby forced to pay £30, &c. *Held*, on special demurrer to the declaration, 1st, that a sufficient consideration appears; 2nd, but that it does not appear plaintiff paid more than his share—or that the other parties had not paid the residue—or that defendant had not paid all the parties but the plaintiff the portions of his share to which they were entitled. *Dempsey and another v. Miller*, 431.

CONVERSION.

In abating a nuisance.] — See NUISANCE, 2.

CORPORATIONS.

See DEBTOR AND CREDITOR—MUNICIPAL COUNCIL ACTS.

COSTS.

See INTERPLEADER—MUNICIPAL COUNCIL ACTS, 4, 5.

COUNTS (SEVERAL.)

See PRACTICE, 1—VENIRE DE NOVO.

COUNTY COUNCILS.

See MUNICIPAL COUNCIL ACTS.

COUNTY COURTS.

See ABATEMENT (PLEA.)

COURTS.

See ABATEMENT.—INTERPLEADER.

COVENANT.

Articles of apprenticeship—Construction—Breach—Action—Parties.] — 1. By an instrument under seal made between A. B. and C. D., father and son, of the *one part*; E. F. and G. H., two partners, coach builders, of the *other part*; the son

with the consent of his father, bound himself apprentice to the coach builders. The instrument contained a clause securing its performance, as follows: "and lastly, for the true and faithful performance, &c., the said A. B., C. D., and E. F. and G. H., do bind themselves unto *each other* in the sum of," &c. *Held*, in an action of debt, brought by the father alone:—1. That all defendant's covenants were with the son and not the plaintiff; 2. That the words "unto each other" did not mean separately and individually, but that *each party* respectively became jointly bound to the other, and that there was therefore a misjoinder of plaintiffs. *Quere*: the sufficiency of the declaration as given in the report. *Connell v. Owen*, 249.

Construction.]—2. An indenture of lease was made between three parties—plaintiff of first part, one A. B. of second part, and defendant of third part. The party of the first part leased to the party of the second part a certain hotel, with certain goods and chattels; and the party of the second part covenanted, among other things, at the expiration or other sooner determination of the lease, to pay the party of the first part the difference between £550 and the value of such goods, which value should be ascertained by, &c. Then it proceeded as follows: "The said party of the third part (defendant) covenants with the said party of the first part that the said party of the second part (lessee) shall pay the difference between the said sum of £550 and the *value* of such of said goods and chattels, &c.," not containing the words "*to be ascertained as aforesaid.*" *Held*, that notwithstanding such omission, upon non-performance by the lessee, plaintiff could recover against defendant.—*Hayes v. Addy*, 262.

Covenant for title—Damages.]—

3. In an action for breach of covenant

for title and freedom from incumbrance the measure of damages is the purchase money and interest. The right to such damages is not lessened by the fact that plaintiffs have never been disturbed in their possession—if an incumbrance really do exist. *Gibson v. Boulton, Hackett v. Boulton*, 407.

CRIME.

See CRIMINAL INFORMATION.

CRIMINAL INFORMATION.

See CUSTOMS ACTS.

Criminal information against a justice.]—Application for leave to file a *qui tam* information against a judge of a Recorder's Court, upon the grounds that he had falsified the records of the court and maliciously condemned applicant as guilty of a felony upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts to support the application were, that the jury came into court to render their verdict, and the foreman pronounced a verdict of guilty. The counsel of the accused then questioned, (not through the court) some of the jury as to the grounds of their verdict, when one of them stated that he did not concur in the verdict. The attention of the court was not drawn to this dissent, nor did it appear they were aware of it. A verdict of guilty was recorded by the presiding judge; and when formally read to the jury by the clerk, no objection was made. The court refused the information. *The Queen v. Ford*, 209.

CUSTOM (LOCAL.)

Carriers and Wharfingers—Local customs—Notice—Pleading.]—Assumpsit on the common counts for work and labor, &c., by plaintiffs, who were carriers by water. Plea, setting forth a delivery of the goods carried by plaintiffs

to a wharfinger at Toronto, to whom defendants, "according to the custom and usage of forwarders and carriers at Toronto," paid the plaintiffs' claim. *Held*, plea bad, for not averring notice of the custom to the plaintiffs. *Torrance et al. v. Hayes et al.*, 274.

CUSTOMS ACTS.

Information—Pleading.]—Information for the condemnation of goods seized as forfeited for breach of the customs laws. 2nd count set forth that the goods were entered with the proper officer of customs—that in such entry they were valued at £ s. d., and that the said goods were in and by such entry so made as aforesaid *undervalued* (not pointing out whether in reference to the domestic or foreign market value), with intent to avoid payment of duty, &c. *Held*, on motion in arrest of judgment, 2nd count sufficient after verdict. (*The Queen v. Brunskill*, 8 U. C. R., upheld.) *The Queen v. Hibbard*, 451.

DAMAGES.

See COVENANT, 3.

DEBT.

See COVENANT, 1.—MUNICIPAL COUNCIL ACTS, 7.

DEBTOR AND CREDITOR.

See PARTNERS, ETC., 1.

Compositions—Requirements—Statute of Frauds.]—Action on three several promissory notes. Defendants plead to the further maintenance of the action a composition with the plaintiff and other creditors, whereby "it was agreed by the defendants with the plaintiff and their other creditors, that after assigning a certain building contract to the Bank of Upper Canada, in discharge of the Bank claim against them, which was accepted, the defen-

dants were to convey all their other estate, effects and contracts to two persons nominated in trust for the plaintiff and the other creditors; and that the plaintiff and the other creditors mutually agreed with each other and with the defendants to accept the said conveyance as a composition, and in full satisfaction of their respective debts in full." Then followed an averment of readiness, &c., but that sufficient time had not been afforded before action; and also, an alleged agreement by the creditors not to proceed for the debts in the meantime. Issue joined by the plaintiff. The assignment, as completed after the commencement of the action, was executed by many creditors, but not by the plaintiff. The subject matter assigned appeared to have been goods, chattels and choses in action far exceeding £10 in value, and yet, at the time of the composition pleaded, no part was delivered or accepted, no earnest paid, nor part payment made; nor was the agreement or composition pleaded in writing; and moreover, the Bank of Upper Canada, a corporation, one of the alleged parties to the agreement, did not appear to have contracted under their seal: *Held*, upon these grounds that the plea was not supported, and a verdict found for the plaintiff at Nisi Prius was therefore not disturbed. *Brunskill v. Metcalf et al.*, 143.

DEED.

See COVENANT — LANDLORD AND TENANT, 2.—MUNICIPAL COUNCIL ACTS, 6.

Description of land conveyed.—1. An oblong tract of land 20 by 100 chains, containing 200 acres, was subdivided into smaller lots with a lane laid out and staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries of the 200 acres. Part of the tract lying to the

east of the lane was sold and conveyed; and in the deed of the part so sold reference was made to a plan which shewed the lane as laid out through the centre of the whole tract, and the said lane was therein declared to be the western boundary of such piece. And in the same deed a right of way was granted to the purchaser in and over the said lane or way, being 83 links in width, "*and which said way is already staked and laid out for the benefit of the occupiers of the said lot.*" Afterwards it was discovered that the eastern and western boundaries of the whole 200 acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed; and that, if therefore those boundaries were shifted to their proper places, as had been done by the owners of adjoining lots, the lane as originally laid out and staked could not still continue to be in the centre of the lot when shifted: *Held*, in an action of ejectment by the purchaser of the piece to the east of the lane, that his western limit could not extend beyond the east side of the lane as *staked out* before the execution of the deed. *Dunn et al. v. Turner*, 104.

Credit to be given to recitals in Sheriff's deed.] 2.—See SHERIFF'S SALE, 2.

DEFENCE TO ACTIONS.

See BILLS OF EXCHANGE, ETC., 1—VENDOR AND PURCHASER, 1.

DE INJURIA.

Action on promissory note.]—1.

Action by an administratrix.—Declaration: first count, on a note made by defendant, payable to A. B. or bearer, who transferred the same to the intestate. Plea, delivery to intestate *after* it became due, and payment to A. B. before it became due. Replication, *de injuria*. *Held*, replication good. *Blackstone v. Chapman*, 221.

Action on note.—2. Assumpsit on a promissory note by indorsee against maker. 1st plea—That the note was given subject to the result of a suit in chancery then and still pending; and that it was agreed that the said note be deposited with Messrs. Connor, Morrison and Macdonald, subject to the result of such suit, &c., and that the said C. M. & McD. should not in any way use, discount, part with, or sue upon said note, except by order of some court of competent authority; or by consent of the defendant. The plea then averred that no order had yet been made in the chancery suit: that there had not been any consent of the defendant to sue upon the note: that the right of the parties to the chancery suit still remained undetermined: and that the suit in the chancery was still pending. 2nd plea—That it was agreed in writing by the plaintiff and the defendant, that in consideration the defendant would give the note the plaintiff would refrain from using the same, &c., until the suit in chancery was settled and determined, and that the same was undetermined. Replication—*de injuria* to both pleas collectively: *Held*, on demurrer, that the replication was good. *Coleman v. Sherwood*, 359.

Action on note.—3. Assumpsit on a promissory note made by defendant payable to plaintiffs. Plea, no consideration—in that the note was given for the debt of a third party not yet due. Replication, *de injuria*. *Held*, replication good, the plea being in excuse. *Quere*: the sufficiency of the plea as set out in the report. *Walker et al. v. Haroke*, 428.

DEPARTURE (IN PLEADING).

See TRESPASS, 2.

DESCRIPTION.

See DEED, 1.

DUPLICITY IN PLEADING.

See CARRIERS.

EASEMENT.

See LANDLORD AND TENANT, 2.

EJECTMENT.

See SHERIFF'S SALE, 1, 2.

Non-suit for not confessing lease, &c.—Time to move against.—1. Where in an action of ejectment lease, entry and ouster is not confessed by defendant, and plaintiff is therefore non-suited, defendant, as in other cases, may move against the non-suit within the first four days of the following term, although a writ of possession against Richard Roe at an earlier period may be regular. In this case defendant moved to set aside the judgment, &c., on the third day of the term following the nonsuit, but his rule was discharged, from informalities in his affidavit. He renewed the application on the last day of the next following term, and shewed a strong case upon the merits. The court granted him relief, looking upon his second application as a continuation of the first. *Doe dem. Ketchum et al. v. Roe*, 259.

N. P. record—Omission of appearance.—2. The court refused to disturb a verdict for plaintiff in ejectment, on the ground that the N. P. record did not contain the appearance, filed, where the record set forth a notice by defendants limiting their defence, and a plea in the form given by the statute (14 & 15 Vic. ch. 114). *The Queen v. Adams et al.* 404.

ELECTIONS.

See MUNICIPAL COUNCIL ACTS, 2, 5.

ESTATE.

See WILL.

ESTOPPEL.

See VENDOR AND PURCHASER, 1.

EVIDENCE.

See BASTARD.—DEBTOR & CREDITOR PARTNERS, ETC.—PRACTICE, 1.—SHERIFF'S SALE, 1, 2.

Admissibility of, to rebut a new case].—1. Where in an action for goods sold and delivered plaintiff made out a *prima facie* case through his clerk, who proved a delivery of the goods, and the promise to pay on request implied therefrom was repelled by defendant, who stated a special contract varying from that implied: *Held*, that plaintiff was admissible to reply to the new case set up by defendant: and *semble*, he could not be excluded as a witness by reason of his presence in court during the examination of his clerk. *McFarlane v. Martin and another*, 64.

EXECUTOR & ADMINISTRATOR

See SET OFF, 1.

FINALITY

In award].—See ARBITRATION, ETC.

FIRE.

See CARRIERS.—LANDLORD AND TENANT, 1.

FLAMBOROUGH.

See MUNICIPAL COUNCIL ACTS, 1.

FRAUD.

See INSURANCE.

FRAUDS (STATUTE OF).

See AUCTION.—DEBTOR & CREDITOR.—LANDLORD AND TENANT, 2.—MUNICIPAL COUNCIL ACTS, 6.

GOODS SOLD & DELIVERED.

See EVIDENCE, 1.—PARTNERS, ETC., 1.

GROWING TIMBER.

See MUNICIPAL COUNCIL ACTS, 6.

HIGHWAYS.

See MUNICIPAL COUNCIL ACTS, 1.—NUISANCE.

Liability of Road Companies for accidents].—Road companies owning public highways and entitled to tolls for the use thereof, are liable for accidents arising from want of repair to the roads. They are liable to an action at the suit of the individual sustaining special injury, as well as to the public, by indictment. *Macdonald v. The Hamilton and Port Dover Plank Road Company*, 402.

HUSBAND AND WIFE.

See BASTARD.

Action by, for monies lent and services rendered by wife dum solo.—*Declaration*]. Assumpsit by husband and wife. Declaration—1st count, "That the defendant was indebted to the plaintiff's wife, while sole and unmarried, in £200, for wages as a hired servant: in £200 for money lent by her: in £200 for money paid by her for him: in £200 for money received by him for her, and in £200 on an account stated," in consideration whereof the defendant promised to pay her, &c. (*while she was sole and unmarried*), on request, &c., yet, &c. Pleas—1st, Non-assumpsit. 2nd, *Actio non accrevit infra sex annos*, with two other pleas. It appeared in evidence that the plaintiff's wife *dum solo* had lent the defendant some money, when to be returned not clearly appearing; and it further appeared that she *dum solo* had worked for the defendant well and faithfully, for three years. There was also evidence of admitted liability by the defendant within six years. The jury gave a verdict for £25, but it was not distinctly stated whether for wages or the money lent.

The court refused to disturb this verdict, it being in accordance with the justice of the case, and it was said that the addition of another count would obviate all difficulty. *Barkerville et ux. v. Corbett*, 159.

—♦—
ILLEGALITY.

See MUNICIPAL COUNCIL ACTS,
passim.

—♦—
ILLEGITIMACY.

See BASTARD.

—♦—
IMPROVEMENTS.

See PARTNERS, ETC., 1.

—♦—
INDICTMENT.

See HIGHWAYS.

Variance.—An indictment alleged a nuisance to be near lot 16, and the evidence shewed it to be on it: *Held*, a fatal variance. *The Queen v. Meyers*, 305.

—♦—
INFERIOR COURTS.

See ABATEMENT.

—♦—
INFORMATION.

See CRIMINAL INFORMATION.

—♦—
INSPECTOR OF PORK.

See PORK INSPECTOR.

—♦—
INSURANCE.

Insurable interests. — Mortgagee.—The holder of a chattel mortgage, being mortgagee, has an insurable interest, though the mortgagor continues in actual possession of the goods mortgaged. The omission of a mortgagor, in effecting an insurance in the name of the mortgagee, to mention the amount of the mortgage, does not render the policy void. Where the mortgage was one under seal and the mortgagee in-

sured before default: *Held*, that he was not entitled to recover on his policy more than the amount appearing on the face of his mortgage at the time of insurance—not being allowed to tack subsequent advances, by parol. In this case the interest of the mortgagee was only 184*l.* 5*s.* 10*d.*, though he insured for the 500*l.* Having recovered a verdict for the 500*l.*, on motion against it, the court ordered the verdict to be set aside unless the plaintiff would elect to reduce the verdict to the 184*l.* 5*s.* 10*d.*, the amount secured on the face of his mortgage. *Ogden v. The Montreal Insurance Company*, 497.

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INTERPLEADER.

Seizure of goods by sheriff—Ownership disputed — Double remedy — Interpleader — Trespass — Costs.—Goods seized by the sheriff under an execution from this court, as the goods of B., were claimed by C. An interpleader was then awarded, to which the claimant became a party. The sheriff sold the goods and paid the proceeds into this court, to await the result of the interpleader issue. During the pendency of the interpleader the claimant brought an action of trespass in the Queen's Bench against the execution creditor for the same seizure, which action was tried at the same assizes with the interpleader issue. The claimant was successful in both cases. The proceeds of the sheriff's sale were then paid to him out of the court. Upon application to this court to stay the proceedings in the Queen's Bench suit, the rule was discharged, as this court has no such power. The court suggested that the plaintiff in the Queen's Bench suit be called upon to deduct the amount received out of this court from his verdict in the Queen's Bench, and be left free to enforce the residue in that suit—costs of the interpleader issue to be refused him. *Stokes v. Eaton*, 267.

INTOXICATION.

See WITNESS, 1.

IRREGULARITY.

See EJECTMENT, 2.

ISSUES.

See ASSUMPSIT, 1.

JURISDICTION.

See INTERPLEADER.

JUSTICE (MAGISTRATE).

See CRIMINAL INFORMATION.

LANDLORD AND TENANT.

See PARTNERS, ETC., 1.

Lease—Rent—Fire.]—1. Where A. leased to B. a certain house and premises for fifteen years, and during the currency of the term, by agreement entered into between A. and C., reciting that B. had agreed to assign his interest to C., A. therein assented to such assignment, and further agreed that C. should have the option to purchase the fee within one year from date, at a given sum, payable by instalments. At the time of the agreement C. paid to A. 50*l.*, to be on account of purchase money, in case he elected to purchase, otherwise to be absorbed in rent. There was a proviso in the original lease to B. that in the event of the house being burnt the rent should cease. C. declared no intention to purchase, and the premises were afterwards destroyed by fire, at which time, long before the expiration of the lease, the rent due amounted to about 12*l.* 10*s.* C. then brought assumpsit against A. in the county court, and recovered the difference between the 50*l.* paid and the rent due up to the time of the fire: *Held*, on appeal to this court, that, notwithstanding the proviso in the original lease as to the plaintiff was entitled to rent

until the 50*l.* was absorbed, and that the action therefore was not maintainable. *Pulver v. Williams*, 56.

Trespass q. c. f. by tenant against landlord—Leave and license, &c.] 2. *Trespass q. c. f. Plea—liberum tenementum.* Replication—demise to the defendant from the plaintiff from year to year. Rejoinder—"that after the demise it was consented and agreed that the defendant and his servants, &c., should have leave to pass and repass in and over the close, in which," &c. *Held*, that to support this rejoinder, a written agreement at least, if not one under seal, should be proved. The defendant also rejoined, that after the license from the plaintiff to cross the close, &c., the plaintiff, without any notice to him (defendant) of his intention to lock the gates of the said close, did lock and fasten the said gates, and that the defendant broke the same, as he lawfully might: *Quere*, the sufficiency of this plea. *Brougham v. Balfour*, 297.

LEASE.

See COVENANT.—LANDLORD & TENANT.—MUNICIPAL COUNCIL ACTS, 8.—PARTNERS, ETC., 1.

LEAVE AND LICENSE.

See LANDLORD AND TENANT, 2.—TRESPASS, 2.

LIBERUM TENEMENTUM (PLEA).

See TRESPASS, 2.

LOCAL CUSTOMS.

See CUSTOMS (LOCAL).

LOGS.

See NUISANCE, 2.—VENDOR AND PURCHASER, 1.

LOUGHBOROUGH.

See SURVEY.

MAGISTRATES.

See CRIMINAL INFORMATION.—
MUNICIPAL COUNCIL ACTS, 7.

MALICIOUS ARREST.

Two counts, one defective—General verdict.—Case for malicious arrest. The declaration contained two counts: 1. Alleging that the defendant, not having, &c., made a false and malicious affidavit, &c. 2. Want of probable cause, &c.: *not alleging the suit to be at an end, nor showing how it ended, if at an end.* Plaintiff obtained a general verdict on both counts for 5l. On motion by defendants to arrest judgment, or for a new trial: *Held*, 2nd count bad for the above omission, and that such omission was not cured by verdict; but that it is no longer the course to arrest judgment where one of several counts is bad, but to order a *venire de novo*, which was accordingly done in this case. *Manning v. Rossin et al.*, 89.

MANDAMUS.

See COMMON SCHOOL ACTS, 2.—
MUNICIPAL COUNCIL ACTS, 2.

MATERIALTY (PLEADING).

See ASSUMPSIT.

MAYORS.

See MUNICIPAL COUNCIL ACTS, 8.

MILL DAMS.

See NUISANCE, 2.

MONEY HAD AND RECEIVED.

See LANDLORD AND TENANT, 1.

MONEY LENT.

See HUSBAND AND WIFE.

MORTGAGE.

Insurance by chattel mortgagee.—
See INSURANCE.

MUNICIPAL COUNCIL ACTS.

Trespass, q. c. f. — Justification under a municipal by-law — Validity thereof — Pleading.— 1. *Trespass quare clausum fregit.* Defendant filed several pleas justifying the trespass as done by him as the servant of the Municipal Council of Wentworth and Halton, and by their command, in pursuance of a by-law by them passed (on 31st January 1850), "in accordance with the provisions and requirements of the Municipal Council Act of 1849" (which came into force on 1st January 1850). *Held*, on demurrer, that it was a valid objection to the several pleas that they did not shew a calendar month's notice, given previous to the passing of the by-law—that, on the contrary, they imported on the face of them that it could not have been given, because the by-law was passed within a month after the Municipal Act of 1849 came into operation. *Held also*, that the Municipal Act of 1849 was sufficiently referred to in the pleadings, being a public act, and that it was not necessary to set out any portion thereof either to identify it or to shew the powers of the Council under it. *Held also*, that a road between the townships of East and West Flamboro' is within the jurisdiction of the Municipal Council of Wentworth and Halton, though it may deviate in some portions entirely in one township. *Held also*, that the clause of the by-law which enacted "that the petitioners should pay all expenses and costs incurred in establishing the road, and that none of the county funds should be applied for land taken for said road," and referring plaintiff to unnamed petitioners for compensation, was void. *Quere*: If such clause had the effect of rendering the by-law void in toto. *Quere also*: Can any individual justify the opening of a new road through private property, under a by-law establishing the road, when the opening is not authorized or directed

in the same by-law, or any supplementary one? *Lafferty v. Stock*, 1.

Election of Township Reeve—Validity thereof—Mandamus.]—2. At an election of township councillors, the person who acted as returning officer for one of the five wards was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, *without taking the oath of office*, proceeded to elect the reeve: *Held*, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election: *Held also*, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being within the meaning of the Municipal Council Act, "on entry upon their duties." A mandamus applied for by the reeve thus elected was therefore refused. *In re Hawk and Ballard*, 241.

Municipal by-laws creating debts, &c.—What they must contain—14 & 15 Vic. ch. 109, sec. 4 — *Equality of annual rate in amount.*]—3. The statute 14 & 15 Vic. chap. 109, sec. 4, prescribing what municipal by-laws creating debts, &c., shall recite and set forth, is only *directory*, and does not declare that the omission of any of the prescribed recitals in any such by-law shall render the by-law invalid or void. The rate to be levied by any municipal council for the payment of a debt or liquidation of a loan, &c., must, under the municipal acts, be *equal* in each successive year, and not fluctuating according to the arbitrary discretion of the municipality. *In re Sells and the Village of St. Thomas*, 286.

Township Councils—their power.]

4. A township council has no authority to declare the qualification of voters.

A by-law enacted by them for such a purpose must be quashed with costs. *In re Bell and the Municipality of the Township of Manvers*, 349.

5. A by-law passed by a township council, levying a sum of money to pay the costs of a contested election is illegal, and will be quashed with costs. *Ib.* 400.

District Council—Power to sell growing timber on allowances for roads—Pleading.]—6. The district councils had no power under 4 & 5 Vic. ch. 10, to pass a by-law authorizing the township councils to sell and dispose of trees growing upon the allowances for roads, &c. A pleading alleging a purchase of such timber from the council ought to shew a transfer by deed, or at least a contract or sale in writing. *Cochran v. Hislop*, 440.

Police magistrates—Remedy for recovery of salaries.]—7. *Held*, that the statute 12 Vic. ch. 81, makes it not only the duty of a town council to pay their police magistrate, but creates a debt the payment of which the magistrate may enforce in an action of *debt*—not as founded upon a contract express or implied, but on the statute and the rights which it confers. *Held also*, that, under the statute, the action may be maintained without the aid of a by-law of the municipality to confer it. *Quere*: Is debt the only remedy? *Wilkes v. the Town Council of Brantford*, 470.

Liability of Mayor for refusing to seal a lease.]—8. Case against the mayor of a municipal council. Cause of action—that the Council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the Council while in session, and defendant being mayor, did instruct and order him as such mayor, for and on behalf of the Council, and in the name of the Council, to make and execute

the lease—of which he had notice—but which he maliciously refused to do, though thereunto requested: *Held*, action not maintainable. *Fair v. Moore*, 484.

NAVIGATION.

See NUISANCE.

NEGLIGENCE.

See HIGHWAYS.

NISI PRIUS.

See EVIDENCE, 1.—WITNESS, 1, 3.—PRACTICE.

NISI PRIUS RECORD.

See EJECTMENT, 2.

NONFEAZANCE.

See HIGHWAYS.

NONJOINDER.

See COVENANT, 1.—PARTNERS, ETC., 1.

NONSUIT.

See AUCTION.—EJECTMENT.

Relief.]—1. A plaintiff who has voluntarily elected a nonsuit, neither by the direction nor suggestion of the court, and without reference to rejection of evidence, cannot be relieved against it.—*Doe Marr v. Marr*, 36.

NOTICES (MISCELLANEOUS).

See EJECTMENT, 2. — MUNICIPAL COUNCIL ACTS, 1.—VENDOR AND PURCHASER, 1.

NUISANCE.

See HIGHWAYS.

What streams are public highways — Obstruction — Indictment — Variance.]—Indictment for a nuisance in obstructing the North Sydenham river and Queen's highway, by erecting a

dam near lot 16, 13th concession of Sombra. The evidence shewed the river in question to be affected by the waters of the St. Clair—to be navigable much higher up than the defendant's dam at some seasons—and at all seasons for some miles above it: that vessels and boats of a certain size had, before the erection of the dam, passed without obstruction to a point higher up the river than the part where the dam was erected, though it did not appear to have been used to any great extent higher up the river than what was called the head of the navigation, a point below the dam: *Held*, that upon such evidence the jury were warranted in finding the stream to be a public navigable water-course. The indictment alleged the nuisance to be near the lot 16, and the evidence shewed it to be on it: *Held*, a fatal variance. *The Queen v. Meyers*, 305.

Obstruction of streams by mill-dams without aprons or slides — Remedy of persons sustaining damage — Pleading.]—2. Trespass for demolishing and destroying plaintiff's mill-dam. Pleas, that the dam was in the bed of and across a certain stream called Boston creek; and that before the passing of 12th Vic. ch. 87, lumber and saw-logs were often floated down said stream; that the said dam had no apron or slide as required by the statute; that logs of defendants were obstructed by the dam; that plaintiff was thereupon requested to make a convenient slide, which he refused; that defendants did therefore remove a small portion of said dam—the trespasses complained of. *Held*, that the pleas represented a water-course within the statute. *Held also*, that the right to pass saw-logs, &c., over plaintiff's dam was derived exclusively from the statute, and that notwithstanding a common law remedy (case) was open to persons sustaining damage by plaintiff's non-compliance with the statutes. *Held also*, that persons owning logs obstructed by such a

dam may summarily remove the obstruction so far as necessary to enable them to enjoy their right. To the pleas above mentioned, plaintiff replied, that after the removing, &c., by the defendants, they converted and disposed of the materials of the dam to their own use: *Held*, that such wrongful conversion was an abuse of the authority in law under which defendants acted, such as to render them trespassers *ab initio*. *Little v. Ince et al.*, 528.

PARENT AND CHILD.

See BASTARD.

PARTNERS AND PARTNERSHIP.

See ARBITRATION, ETC.—SET OFF, 2.

Non-joinder.]—A. and B. being partners, A. alone verbally leases certain premises for a place of business, for a term of five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A. but never signed by the lessor. It was verbally agreed between the lessor and A. that A. should erect a granary, &c. on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved, and B. releases and assigns to A. all his right to debts, &c. A. then takes C. into partnership, with whom the lessor settles the account for the goods by allowing an alleged set-off. A. afterwards brings an action against his lessor for the goods sold and the value of the granary, &c. *Held*, 1st. that B. should have joined in such an action. 2nd. That the settlement with C. was not *bona fide* as against A. 3rd. That no lease having been executed, upon the facts A. was a tenant at will, and that it might be orally agreed that he

should make improvements and be paid for them, and that plaintiff might sue for them in his own name though built with partnership funds.

Quere.—Whether should the action be for work, labor, and materials, or upon the special agreement?—*Brougham v. Balfour*, 72.

PIGS.

See TRESPASS, 1.

PLEADING.

See ABATEMENT. — ASSUMPSIT — BILLS OF EXCHANGE, etc., 1, 2, 3. — CARRIERS—CONTRIBUTION—COVENANT. — CUSTOM. — CUSTOMS ACTS.—DE INJURIA. — HUSBAND AND WIFE. — INDICTMENT.—MALICIOUS ARREST.—MUNICIPAL COUNCIL ACTS, 1, 6.—NUISANCE, 2.—SET OFF, 1.—TRESPASS, 2.

POLICE MAGISTRATE.

Remedy for recovery of salary.] See MUNICIPAL COUNCIL ACTS, 7.

PORK INSPECTOR.

His duty—Pleadings.]—Sci. fa. on a bond to the Queen for performance of duty by a pork inspector. Plea set out the condition, and then averred performance. Assignment of breaches shewed an agreement to refer pork to the inspector for his inspection, and then alleged that he *wrongfully* branded pork of inferior quality with the words "prime mess pork," &c., contrary to the form of the statute, and contrary to his duty. Demurrer, that the replication did not allege that the acts of the inspector complained of were *breaches of his duty*, or were done by him *knowingly*, *willingly*, or *designedly*, or that he did not in respect of such matters use the best of his *skill, judgment, and ability*: *Held*, on the facts alleged in the assignment of breaches, and assu-

ming them to be true as alleged, that the bond was forfeited. *McQueen v. Mowat*, 228.

PRACTICE.

See EJECTMENT, 1, 2.—VENIRE DE NOVO.

Several counts—General verdict—One count bad.]—*Semble*: Where there are several counts one of which is defective, and a general verdict is rendered, an application to restrict the verdict to the good counts when it depends on the application of the evidence to the different counts, should be made to the judge who tried the cause.—*Manning v. Rossin et al.*, 89.

PRESUMPTIONS.

See BASTARD—SHERIFF'S SALE, 2.

PRINCIPAL AND SURETY.

See COVENANT 2.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, ETC.

PUBLIC HIGHWAYS.

See HIGHWAYS—NUISANCE—ROADS.

PUBLIC NUISANCE.

See NUISANCE.

PUBLIC SCHOOLS.

See COMMON SCHOOL ACTS.

PUBLIC STREAMS.

See NUISANCE, 1, 2.

QUI TAM INFORMATION.

See CRIMINAL INFORMATION.

RATES.

See TAXES.

RECITALS.

See SHERIFF'S SALE, 2.

RECORD (NISI PRIUS).

See EJECTMENT, 2.

RECORDER.

See CRIMINAL INFORMATION.

RELEASE.

See PARTNERS, ETC.

RENT.

See LANDLORD AND TENANT, 1.

REPUTATION.

See BASTARD.

REVENUE LAWS.

See CUSTOMS ACTS.

RIVERS.

See NUISANCE, 1, 2.

ROAD COMPANIES.

See HIGHWAYS.

ROADS.

See HIGHWAYS.

ROMAN CATHOLICS.

See COMMON SCHOOL ACTS, 2.

SAW LOGS.

Right to float in streams in this Province.]—See NUISANCE, 2.

SCANDAL.

Witness not obliged to answer questions importing scandal to himself—*Doe Marr v. Marr*, 36.

SCHOOL ACTS.

See COMMON SCHOOL ACTS.

SEPARATE SCHOOLS.

See COMMON SCHOOL ACTS.

SET OFF.

Action by Administratrix.—1. The declaration contained eleven counts, with damages, alleged at £200. Defendant pleaded to the whole declaration that the intestate was indebted to defendant in £250 on a judgment obtained for £138 5s. 7d.: *Held*, plea defective. *Blackstone v. Chapman*, 221.

Action by Partners.—2. Evidence of a debt due by one of a firm (plaintiff) in his *individual* capacity, will not support a plea of sett off to an action by the firm for a partnership claim. *Pegg et al. v. Barber*, 396.

SETTING ASIDE PROCEEDINGS.

See EJECTMENT, 1, 2.—INSURANCE—WITNESS 3.

SEVERAL COUNTS.

See PRACTICE.—VENIRE DE NOVO.

SHERIFF'S SALE.

Ejectment by sheriff's vendee—Proof of title.—1. P. brought ejectment for the recovery of land in B.'s possession. B. thereupon attorned to P., and continued in possession. The sheriff afterwards, on an execution against P.'s lands, received by him (the sheriff) before the attornment, sold and conveyed the land in question to D., who then brought ejectment against B. for recovery of the same. *Held*, that B. was in privity with P., and bound by the sale. *Held also*, that the levy was sufficient, though the sheriff had not made an entry on the land. *Held also*, that as between the parties, proof of the *fi. fa.* against P.'s lands, without proof of the judgment, was sufficient. *Douglass v. Bradford*, 459.

2. In ejectment by a purchaser at sheriff's sale credit is *prima facie* to be given to the sheriff's return and to the recitals in his deed to the purchaser. In the absence of proof to the contrary, all should be presumed rightly done that should have been done to render the sale valid. *Held*, in this case, that the recitals in the sheriff's deed were not disproved, and that there was no sufficient proof of abandonment of the execution. *Mitchell v. Greenwood*, 465.

SHERIFF'S VENDEE.

Proof of title.—See SHERIFF'S SALE.

STATUTE OF FRAUDS.

See AUCTION.—DEBTOR AND CREDITOR.—LANDLORD AND TENANT, 2.—MUNICIPAL COUNCIL ACTS, 6.

STATUTE.

Obligation by statute—Common law remedy.—See MUNICIPAL COUNCIL ACTS, 7.—NUISANCE, 2.

STATUTES (CONSTRUCTION OF).

29 Car. II. ch. 3, sec. 17.—See "Auction."
 26 Geo. III. ch. 86.—See "Carriers."
 5 Will. IV. ch. 1.—See "Bills of Exchange," etc., 4.
 8 Vic. ch. 8.—See "Bills of Exchange," etc., 4.
 4 & 5 Vic. ch. 10.—See "Municipal Council Acts," 6.
 4 & 5 Vic. ch. 88.—See "Pork Inspector."
 10 & 11 Vic. ch. 81.—See "Customs Acts."
 12 Vic. ch. 1.—See "Customs Acts."
 12 Vic. ch. 81.—See "Municipal Council Acts."
 12 Vic. ch. 87.—See "Nuisance," 2.
 18 & 14 Vic. ch. 48.—See "Common School Acts," 1.
 14 & 15 Vic. ch. 109.—See "Municipal Acts," 8.
 14 & 15 Vic. ch. 114.—See "Ejectment."

STAY OF PROCEEDINGS.

See INTERPLEADER.

STREAMS.

See NUISANCE, 1, 2.

SURETY.

See COVENANT, 2.

SURVEY.

See DEED, 1.

Disputed boundaries — Original surveys.]— In the first government survey of a township (Loughborough), the lines between alternate concessions only, as the 2nd & 3rd, 4th & 5th, 6th & 7th, had been run and staked out, numbering from south to north. These lines were not straight but curved or bended southward in the centre of the township. It appeared (though not very satisfactorily) that several persons had, under government, settled according to these lines. Subsequently, a surveyor was employed by government to run the concessions omitted in the first survey, viz., 1st & 2nd, 3rd & 4th, 5th & 6th concessions. He did so; but instead of running them parallel to, or diverged, as the lines formerly surveyed, he ran them in straight lines, thus cutting off part of the rear of the northerly concessions and adding them to the front of the southerly concessions: *Held*, that the last mentioned survey could not be adopted as the governing one. *Keeley v. Harrigan*, 173.

TAXES.

See COMMON SCHOOL ACTS, 1. —
MUNICIPAL COUNCIL ACTS, 3.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See PARTNERS, ETC.

TENDER.

See AUCTION.

TIMBER.

See MUNICIPAL COUNCIL ACTS, 6.—
VENDOR AND PURCHASER.

TITLE.

See SHERIFF'S SALE, 1, 2.

TITLE (COVENANT FOR).

Measure of damages.]—See COVENANT, 3.

TITLE PARAMOUNT.

See VENDOR AND PURCHASER, 1.

TOWNSHIP COUNCILS.

See MUNICIPAL COUNCIL ACTS, 4, 5.

TRESPASS.

See LANDLORD AND TENANT, 2.—
MUNICIPAL COUNCIL ACTS, 1.—
NUISANCE, 2.

Trespass q. c. f. — When maintainable.]— 1. Trespass *quare clausum fregit* will lie by the owner of a close into which a neighbour's pigs may break, and enter, and do damage, against the owner of the pigs, unless he can excuse the act for defect of fences, or upon some other ground that ought to be specially pleaded. *Blacklock v. Millikan*, 34.

Trespass q. c. f. — New assignment — Liberum tenementum.]— 2. Trespass *q. c. f.* Plaintiff declared for trespasses to his close, describing it. Defendant pleaded soil and freehold to the whole close. Plaintiff replied a demise of the whole close to himself from defendant. Defendant, admitting the demise, rejoined leave and license from plaintiff to commit the trespasses complained of. Plaintiff traversed the alleged consent or leave, and new assigned trespasses on other occasions, and for other purposes, but adhered to the same close. Defendant again pleaded soil and freehold to the new assignment: *Held*, on demurrer to

such plea, that it was bad, as tending to endless prolixity, as being inconsistent with the previous pleadings, and as being a departure therefrom. *Brougham v. Balfour*, 114.

TROVER.

See AUCTION.

VARIANCE.

See INDICTMENT.

VENDEE OF SHERIFF.

Proof of title.]—See SHERIFF'S SALE, 1, 2.

VENDOR AND PURCHASER.

See AUCTION—DEED—LANDLORD AND TENANT, 1.

Vendor and vendee of logs severed from the realty—Title paramount.]

—1. A. agrees to sell to B. a lot of land, and to give him a deed upon payment of a certain price by instalments. B. went into possession of the lot, but made default in the payments, whereupon A. conveyed the same lot by deed to C. B., being still in possession, after default and after the conveyance to C., cut timber on the lot, and sold the logs to D., who had no notice of C.'s title. C. brought ejectment against B., laying the demise at a period antecedent to the cutting of the timber, and recovered. He then gave notice to D. not to pay any more money to B. on account of the logs, but to pay the balance due to him C. B. sued D. in assumpsit for the price of the logs, and D. set up, as a defence, the notice and the paramount title of C.: *Held*, defence good, the rule of *caveat emptor* and of estoppels not applying strictly in this case. *McMahon v. Grover*, 65.

VENIRE DE NOVO.

It is no longer the course to arrest judgment where one of several counts

is bad, but to order a *venire de novo*. *Manning v. Rossin et al.*, 89.

VERDICT.

See CUSTOMS ACTS.—EJECTMENT, 2.—HUSBAND AND WIFE.—INSURANCE.—MALICIOUS ARREST.

Failure of plaintiff to attend as a witness—Setting aside verdict therefor.]—See WITNESS, 3.

VOTERS.

See MUNICIPAL COUNCIL ACTS, 4.

WATER-COURSE.

See NUISANCE, 1, 2.

WHARFINGERS.

See CUSTOM (LOCAL).

WILL.

Construction—Estate devised—Fee or life?]—A testator, by his will, made before the 4th Wm. IV., ch. 1, and written in French (a translation of which was before the court,) after devising to his wife "the full enjoyment of all his goods, property (*biens*) real and personal, moveables and immoveables of what nature or kind they may be, during her life," then proceeded, "I will and order, that after the decease of my wife Agatha, *all my goods, property (biens), aforesaid whatever they may be*, be divided, and owned equally among all my children viz., B., C. D., P., and N., J. R. and F." *Held*, that the devisees were tenants in common in fee, and not merely for life. *Sanders et ux. v. Janette et al.*, 292.

WITNESS.

See EVIDENCE, 1.

Contempt.]—1. It is in the discretion of a judge at Nisi Prius to refrain from committing a witness for contempt in not answering, if it be sought

by the questions put to him to elicit an admission of facts importing scandal upon himself, and especially so if the witness be intoxicated and not able to give evidence at all. *Doe Marr v. Marr.*

Admissibility of parties to the suit.]

2. The defendant in a cause cannot be rejected from giving evidence in his own behalf on account of his presence in court during the progress of the cause. *Strachan et ux. v. Jones*, 253.

Non-attendance of plaintiff as a witness when notified by defendant.]

3. It is no ground for setting aside a ver-

dict for plaintiffs that one of the plaintiffs who had been notified to attend the trial by defendant, failed to attend as he was not called for at the trial—defendant's counsel being also absent. *Pegg et al. v. Barber*, 396.

—♦—
WORK AND LABOR.

See PARTNERS, ETC.

—♦—
WRONGFUL CONVERSION.

In abating a nuisance.]—*See* NUISANCE; 2.



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